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IN THE
SUPREME COURT OF THE UNITED STATES

_____ TERM, 197___

NO. 73-1142

BANK OF COMMERCE OF LAREDO,

PETITIONER

VS

CITY NATIONAL BANK OF LAREDO, ET AL

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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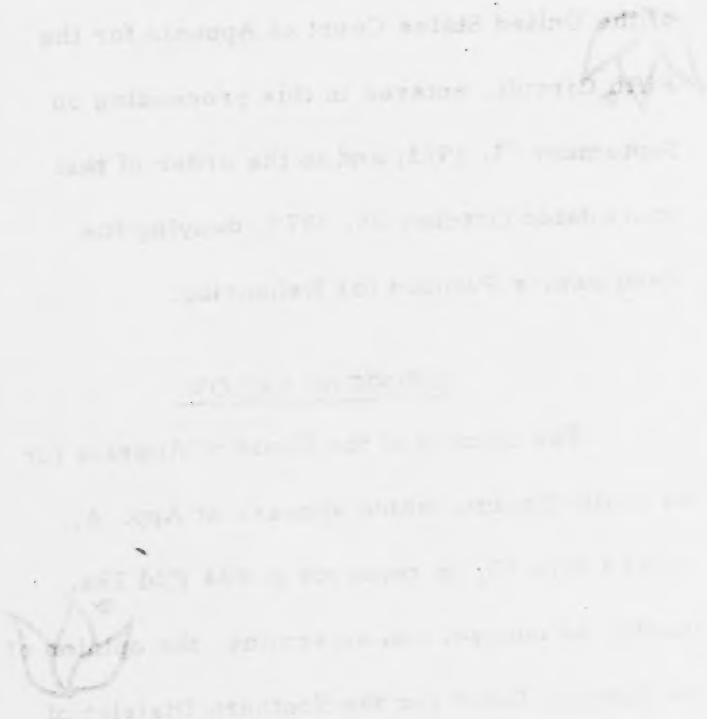
The petitioner, Bank of Commerce of Laredo, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on September 13, 1973; and to the order of that court dated October 25, 1973, denying the Petitioner's Petition for Rehearing.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, which appears at App. A, pages 1 thru 20, is reported at 484 F2d 284. Insofar as counsel can determine, the opinion of the District Court for the Southern District of Texas, Laredo Division has not been published, but it is reproduced at App. C, pages 23 thru 33 hereof. The order of the Comptroller of the Currency appears at App. E, Pages 37 thru 44.



JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit (App.A, pp. 1 thru 20), was entered on September 13, 1973. A timely Petition for Rehearing was denied on October 25, 1973. The jurisdiction of this Court is invoked under 28 USC Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court err in denying the plaintiff (petitioner herein) the right to the use of discovery processes?

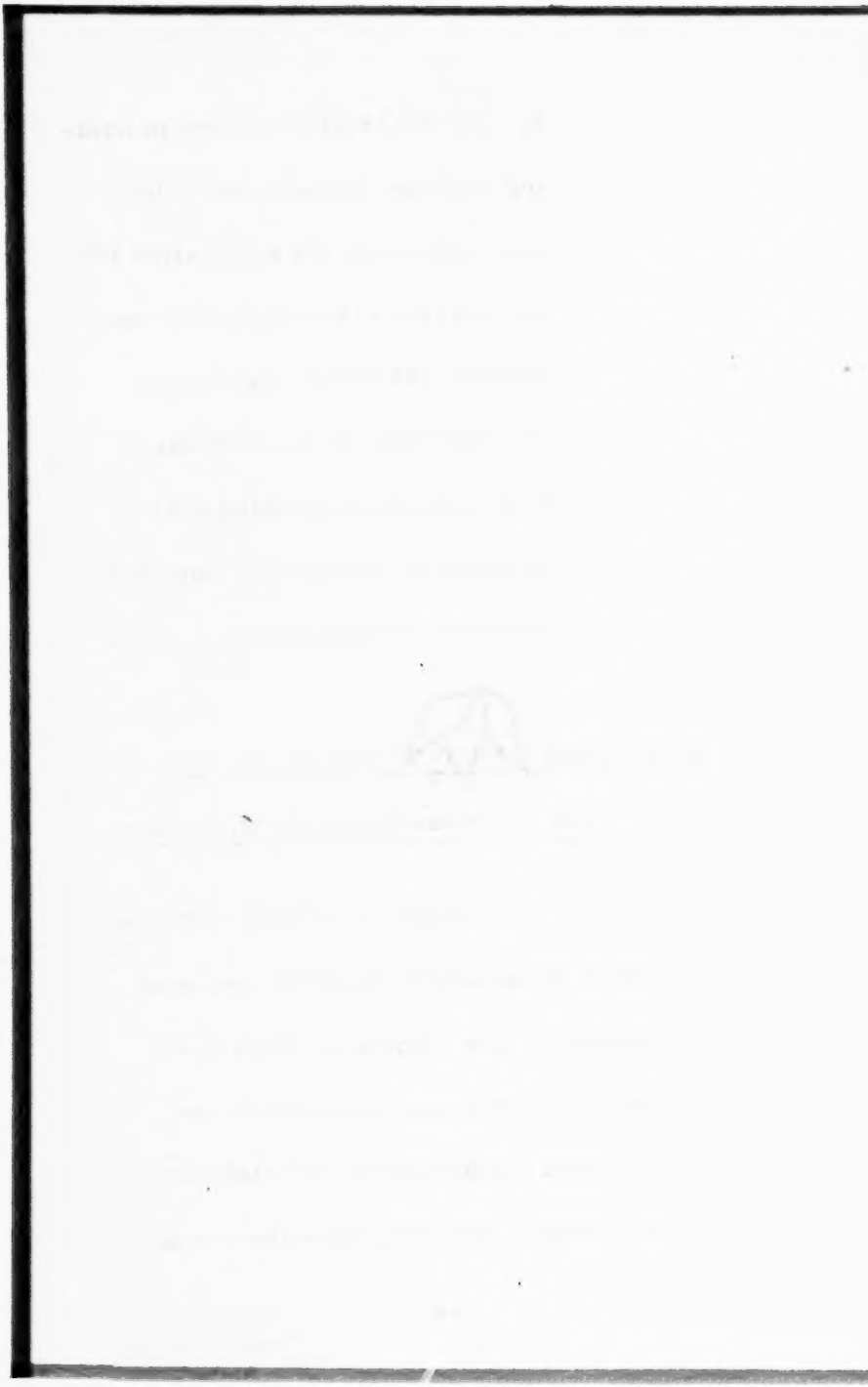
2. Did the trial court err in refusing to order the Comptroller of the Currency to explain the reasons for his decision approving the application for the charter of the defendant bank?

3. Did the trial court err in holding that the Comptroller's decision approving the application for the charter of the defendant bank was not arbitrary, capricious or otherwise not in accordance with law and in granting the defendants' motion for summary judgment on that basis?

STATUTORY PROVISIONS INVOLVED

Title 5, United States Code, Section 706:

"706. Scope of review. --To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the mean-



ing or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. (Sept. 6, 1966, P. L. 89-554§1, 80 Stat. 393."

and Title 12 USC, being the National Bank Act, and particularly Sections 21, 26 and 27 of said Title 12, which sections are reproduced at Appendix F, pp. 45 thru 48 .

STATEMENT OF THE CASE

Federal Jurisdiction in the Court of the first instance was invoked under the provisions of Title 5, Section 706, United States Code, and Title 12, United States Code, and particularly Sections 21, 26 and 27 thereof.

An application for a charter of the proposed defendant, City National Bank of Laredo, dated November 11, 1971, was submitted to the Regional Administrator in Dallas, Texas, on November 12, 1971, by the defendants, Hall, Sanchez, Guerra, Magnon and Zuniga. (See page 838 of the Administrative File). On November 22, 1971, the application was returned for correction. (Page 829 of AF). A corrected application was filed on November 26, 1971, (page 828 of AF), and this application was accepted for filing on December 3, 1971. (p. 821 of AF). On or about December 13, 1971, the

Union National Bank of Laredo requested permission to be heard on the application, (p. 797 of AF), and on the same day the plaintiff bank; Bank of Commerce of Laredo notified the Comptroller it desired to be heard (p. 795 AF). On December 16, 1971, the Union National Bank of Laredo requested a formal hearing (p. 791 of AF). On December 22, 1971, Ramiro Sanchez, President of the Laredo National Bank and one of the organizers of the proposed City National Bank, wrote to the Regional Administrator stating that the Laredo National Bank would like to appear in favor of the petition (p. 783 of AF). On December 28, 1971, the applicants for the charter requested an extension of time in which to file their economic survey to January 7, 1972, and this application was granted on January 3, 1972, (pp. 780 and 781 of AF). This survey prepared by the applicants was filed on or about January 5, 1972, and on January 7, 1972, the attorney for

the applicants wrote to the Regional Administrator and stated that they did not have a definite location yet, but to keep this information confidential. (p. 773 of AF). On January 14, 1972, Mr. Knight, a Bank Examiner, was ordered by the Regional Administrator to commence a field investigation on January 24, 1972, and he was furnished a copy of the economic survey filed by the applicants. The Regional Administrator then set the formal hearing for February 15, 1972, in Dallas (p. 758 of AF). The Bank of Commerce of Laredo, Petitioner herein, filed a motion for continuance on or about February 4, 1972 (p. 754 of AF), which was denied by letter dated February 7, 1972, (p. 748 of AF). A hearing was held on February 15, 1972, and a transcript of the matters presented by the various parties present appears as an attachment to the Administrative file. Preliminary approval of the application was given

by the Comptroller on May 23, 1972 (pp. 2-4 of AF) and(pages 37 thru 44 of Appendix E hereof.) Both the Union National Bank and the plaintiff bank filed economic surveys which appear in the administrative file, but which were not used by the field investigator in making his investigation and recommendations. On June 12, 1972, Plaintiff, Bank of Commerce of Laredo, filed its original complaint, and on December 6, 1972, filed its First Amended Original Complaint against City National Bank of Laredo, Horace C. Hall, III, Ramiro Sanchez, Alberto H. Magnon, Jr., Armengol Guerra, Jr., Carlos A. Zuniga, Max A. Mandel, Gary G. Jacobs, Michael Doman, individually and in his official capacity as Regional Administrator of National Banks under the Office of the Comptroller of the Currency, the Department of the Treasury, the Government of the United States, William B. Camp,

individually and in his official capacity as Comptroller of the Currency of the United States, the Department of the Treasury, Government of the United States, and the Laredo National Bank. Plaintiff sought the following relief:

1. That after notice and hearing a preliminary injunction issue during the pendency of the cause as follows:

a. Enjoining the defendant, William B. Camp, as Comptroller of the Currency, from issuing a certificate of authority to the defendant, City National Bank of Laredo and its applicants, should such certificate not have been issued at the time of the filing of said petition.

b. Enjoining the defendants, City National Bank of Laredo, and its organizers, Horace C. Hall, III, Ramiro Sanchez, Alberto H. Magnon, Jr., Armengol Guerra,

Jr. and Carlos A. Zuniga, from exercising any right or privilege purported to have been granted by the Comptroller of the Currency by virtue of any certificate approving said application that might have been issued by the office of the Comptroller.

c. That after hearing this Court order that a trial de novo be had on all issues presented in this cause.

2. That upon a final hearing of this cause:

a. A declaratory judgment be entered providing that:

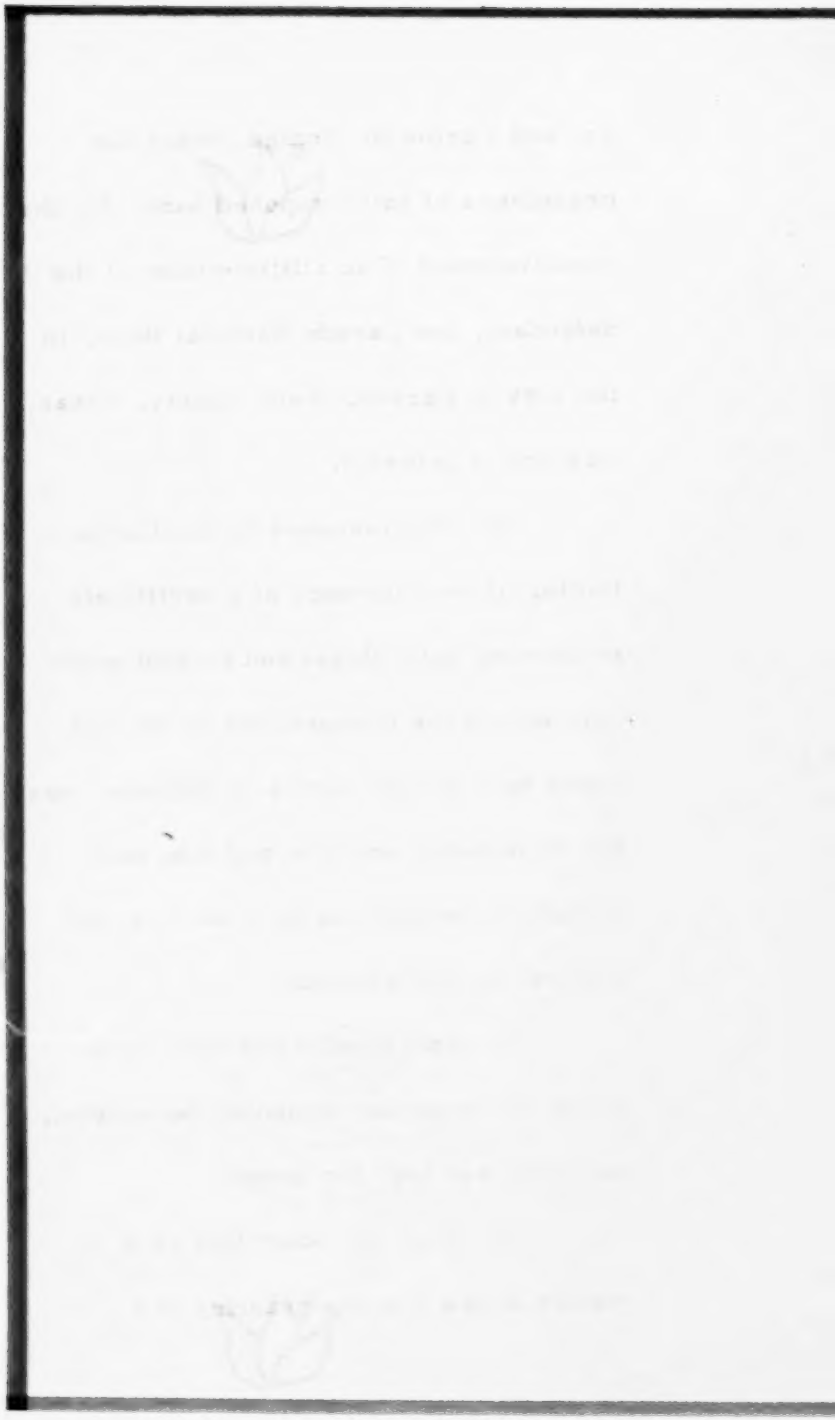
(1) The approval by the Comptroller of the Currency of an application by the defendant, City National Bank of Laredo and Horace C. Hall, III, Ramiro Sanchez, Alberto H. Magnon, Jr., Armengol Guerra

Jr. and Carlos A. Zuniga, being the organizers of said proposed bank, for the establishment of an affiliate bank of the defendant, the Laredo National Bank, in the City of Laredo, Webb County, Texas, was and is unlawful.

(2) The issuance by the Comptroller of the Currency of a certificate evidencing said illegal and invalid approval, should the Comptroller of the Currency have issued such a certificate, was and is likewise unlawful and that said certificate should one have been issued, was and is void ab-initio.

(3) Said invalid and void certificate or temporary approval be vacated, set aside and held for naught.

(4) That the Court find as a matter of law that the granting of a



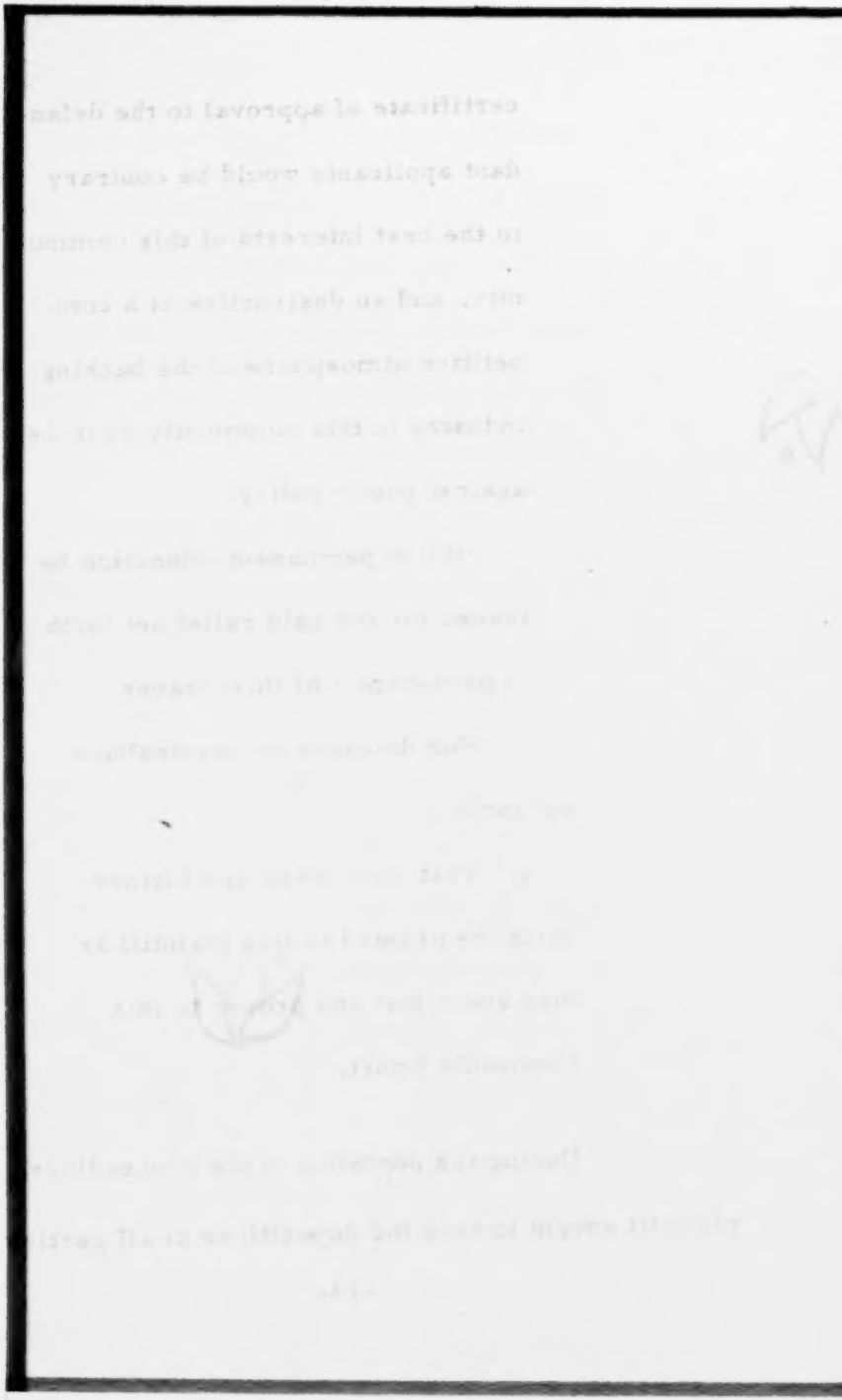
certificate of approval to the defendant applicants would be contrary to the best interests of this community, and so destructive of a competitive atmosphere of the banking industry in this community as to be against public policy.

(5) A permanent injunction be issued for the said relief set forth in paragraph 1 of this Prayer.

3. For damages as hereinabove set forth.

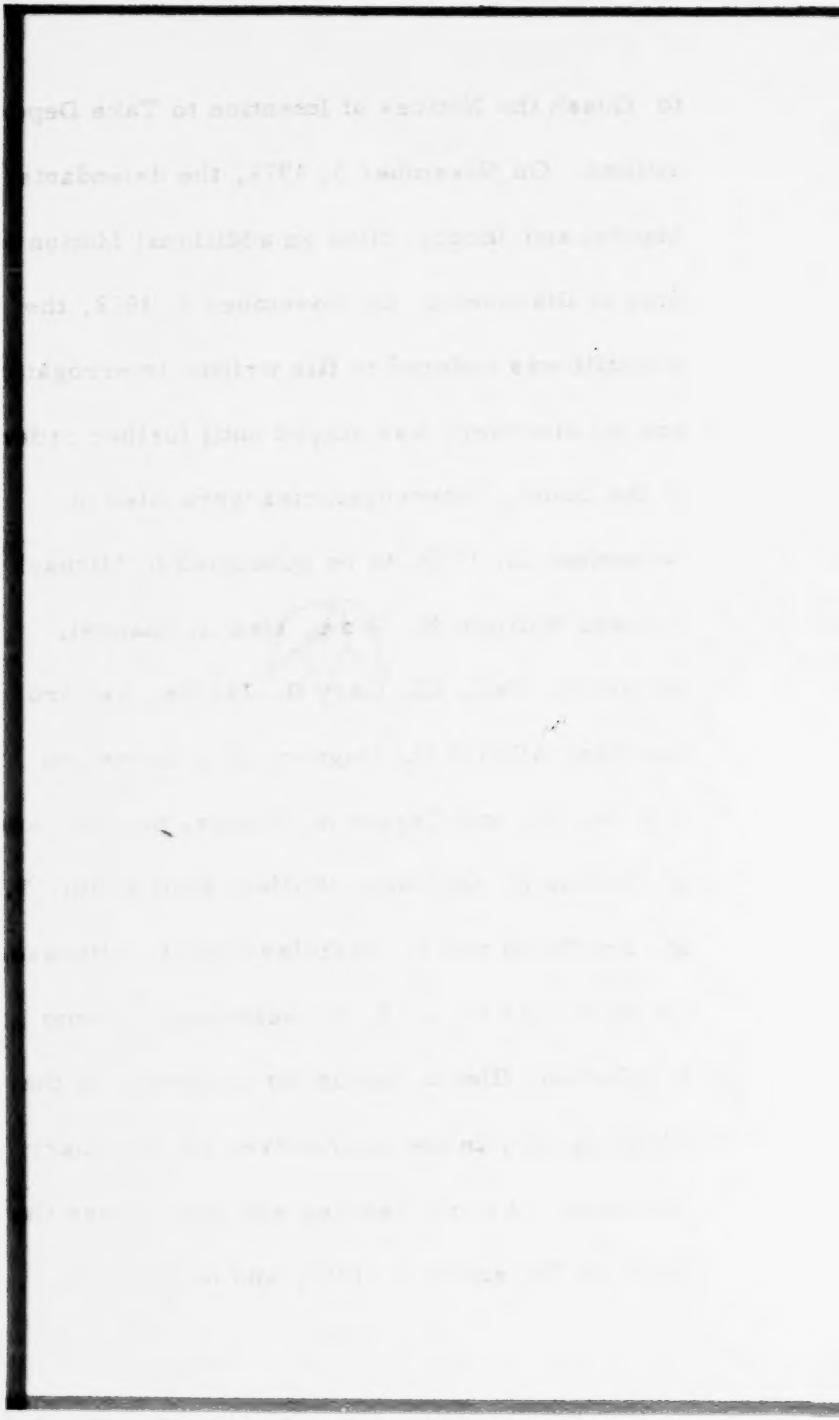
4. That such other and further relief be granted to this plaintiff as may seem just and proper to this Honorable Court.

During the pendency of the proceedings, plaintiff sought to take the depositions of all parties



defendant, as well as other witnesses, and upon order of the court filed a form of written interrogatories that it desired to be submitted to the witnesses . On June 29, 1972, the defendants, City National Bank of Laredo, Hall, Sanchez, Magnon, Guerra and Zuniga, filed a motion to dismiss for failure to state a claim and in the alternative, for judgment pursuant to Rule 12b of the Federal Rules of Civil Procedure. On July 3, 1972, the defendants, Laredo National Bank, Mandel and Jacobs, filed a Motion to Dismiss the Complaint. On October 31, 1972, the defendant, City National Bank of Laredo, filed its motion to quash notices of intention to take deposition. On November 1, 1972, the Defendants, Mandel and Jacobs, filed their Motion for Stay of Discovery. On November 2, 1972, the defendant, City National Bank, Hall, Sanchez, Magnon, Guerra and Zuniga, filed their Motion

to Quash the Notices of Intention to Take Depositions. On November 3, 1972, the defendants, Mandel and Jacobs, filed an additional Motion to Stay of Discovery. On November 6, 1972, the plaintiff was ordered to file written interrogatories and all discovery was stayed until further order of the Court. Interrogatories were filed on November 21, 1972, to be submitted to Michael Doman, William B. Camp, Max A. Mandel, Horace C. Hall, III, Gary G. Jacobs, Ramiro Sanchez, Alberto H. Magnon, Jr., Armengol Guerra, Jr. and Carlos A. Zuniga, parties, and to Thomas G. DeShazo, William Paul Smith, T. M. Brezinski and P. Brantley Knight, witnesses. On November 17, 1972, the defendants, Camp and Doman, filed a Motion for Judgment on the Pleadings or, in the alternative, for Summary Judgment. An oral hearing was held before the Court on December 5, 1972, and on April 25,



1973, a memorandum and order was entered by the Court in which the Court stated in part:

> "Upon reviewing the administrative file and Plaintiff's pleadings and briefs, the Court concludes that the Comptroller's decision was not arbitrary, capricious, or otherwise not in accordance with law. For this reason, the several motions for summary judgment filed by the respective Defendants must be, and hereby are, granted. Counsel for the Defendants shall prepare a form of final judgment in accordance with the foregoing Memorandum and Order, and present same to the Court within fifteen (15) days from this date. The Clerk shall furnish the appropriate counsel with copies hereof."

See App. C pp. 32-33). On May 16, 1973, Final Judgment was entered granting all of the

Defendants' Motions for Summary Judgment and dismissing the case with prejudice. (See App. D p. 34-36).

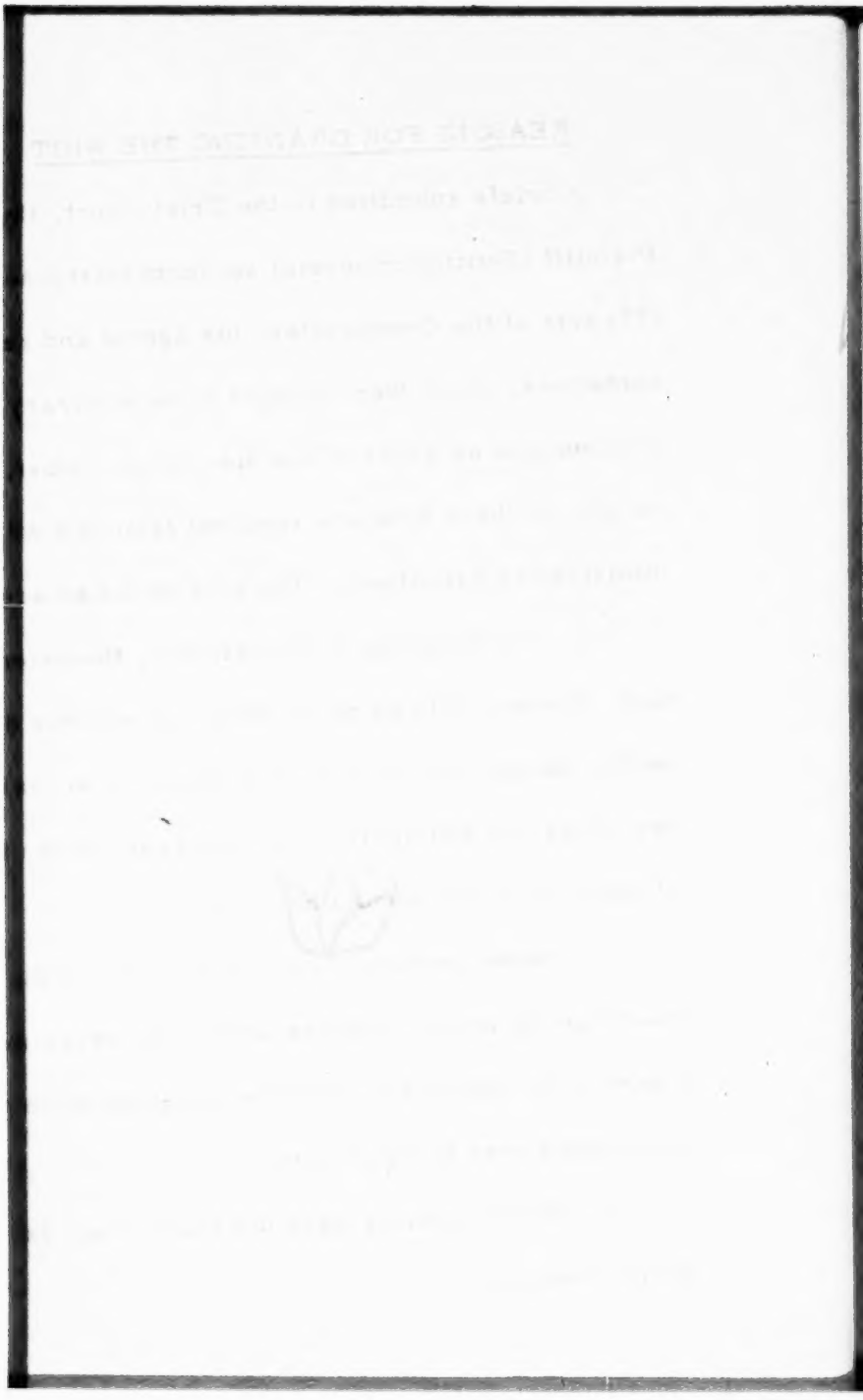
REASONS FOR GRANTING THE WRIT

In briefs submitted to the Trial Court, the Plaintiff (Petitioner herein) set forth thirty-seven (37) acts of the Comptroller, his agents and representatives, which were alleged to be arbitrary, capricious and an abuse of his discretion. Most, if not all, of these acts are apparent from the Administrative File itself. The acts as listed are:

"1. The Regional Administrator, the defendant, Doman, held ex parte meetings with the defendants, Mandel and Jacobs, and others on at least two occasions and advised these persons of the type of application that should be filed.

2. Memorandums were made of two of the meetings but these memorandums were never made a part of the public file until the administrative file was turned over to this Court.

3. Memorandums were not made of all ex-parte meetings.



4. The plaintiff bank was advised by the Regional Administrator not to prepare an economic survey until the survey of the applicants had been furnished them. When the applicants' survey was finally furnished, the plaintiff was not given sufficient time in which to prepare its economic survey.

5. The field investigation was ordered by the Regional Administrator when only the economic survey of the applicants was on file, and the field investigator made his report based only on the survey filed by the applicants.

6. The field investigator did not make a complete investigation but based his report primarily on verbatim statements from the economic survey of the applicants.

7. The field investigator falsely stated that the proposed bank was to be located four and one-fourth (4 1/4) miles from the plaintiff bank, when actually, the correct distance is only approx-

imately two (2) miles.

8. The field investigator stated that the plaintiff bank is in the downtown section of the City of Laredo when actually, the plaintiff bank is located on the outskirts of the downtown section of Laredo and is less than six minutes driving time within the proposed primary service area.

9. The Regional Administrator permitted the applicants to choose their own service area even though a good portion thereof is located closer to the plaintiff bank than it is to the proposed bank even if it is located at the location originally shown.

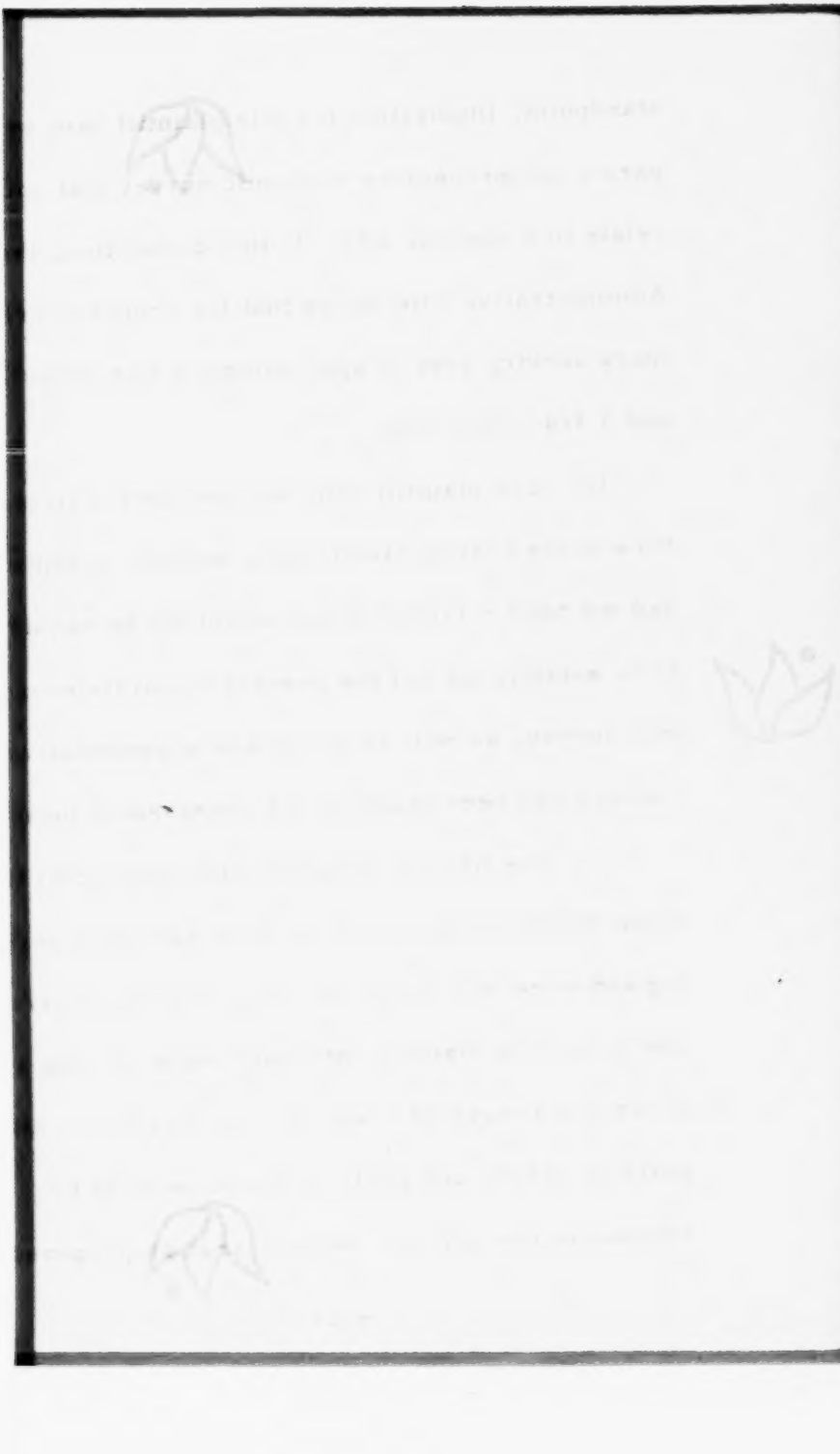
10. The Regional Administrator refused to grant to the plaintiff bank sufficient time in which to prepare its economic survey and other matters necessary to contest the proposed application.

11. The Regional Administrator, in not requiring the applicants to give a specific location for the proposed bank, made it, from a practical

standpoint, impossible for this plaintiff bank to prepare a comprehensive economic survey that could relate to a specific site. In this connection, the Administrative File shows that the proposed primary service area is approximately five miles long and 3 3/4 miles wide.

12. The plaintiff bank learned for the first time at the hearing itself that a definite location had not been established and would not be required to be established and the preparation of its economic survey, as well as briefs and argumentative matters had been based on the represented location.

13. The field investigator also stated that the three downtown banks did not have sufficient parking and were in a congested area, whereas in truth and in fact the plaintiff bank has ample parking and is not in a congested area but is accessible to all parts of Laredo and particularly accessible by freeway to the primary service area as proposed



by the applicants.

14. The applicants notified the Regional Administrator by confidential letter that they had an alternate location which was possibly better than the original location, and this letter was not made a part of the public file but was actually labeled 'submitted only to the court due to reproduction difficulty.'

15. The Regional Administrator refused to honor a written request by the plaintiff bank that copies of all materials filed by any parties to the proceeding be forwarded to the plaintiff bank even though such a request by other parties was honored.

16. The Regional Administrator refused to require the applicant bank to state a definite location where the new bank would be located.

17. The Regional Administrator ruled that the applicant bank could be located anywhere in the primary service area and that the plaintiff bank did

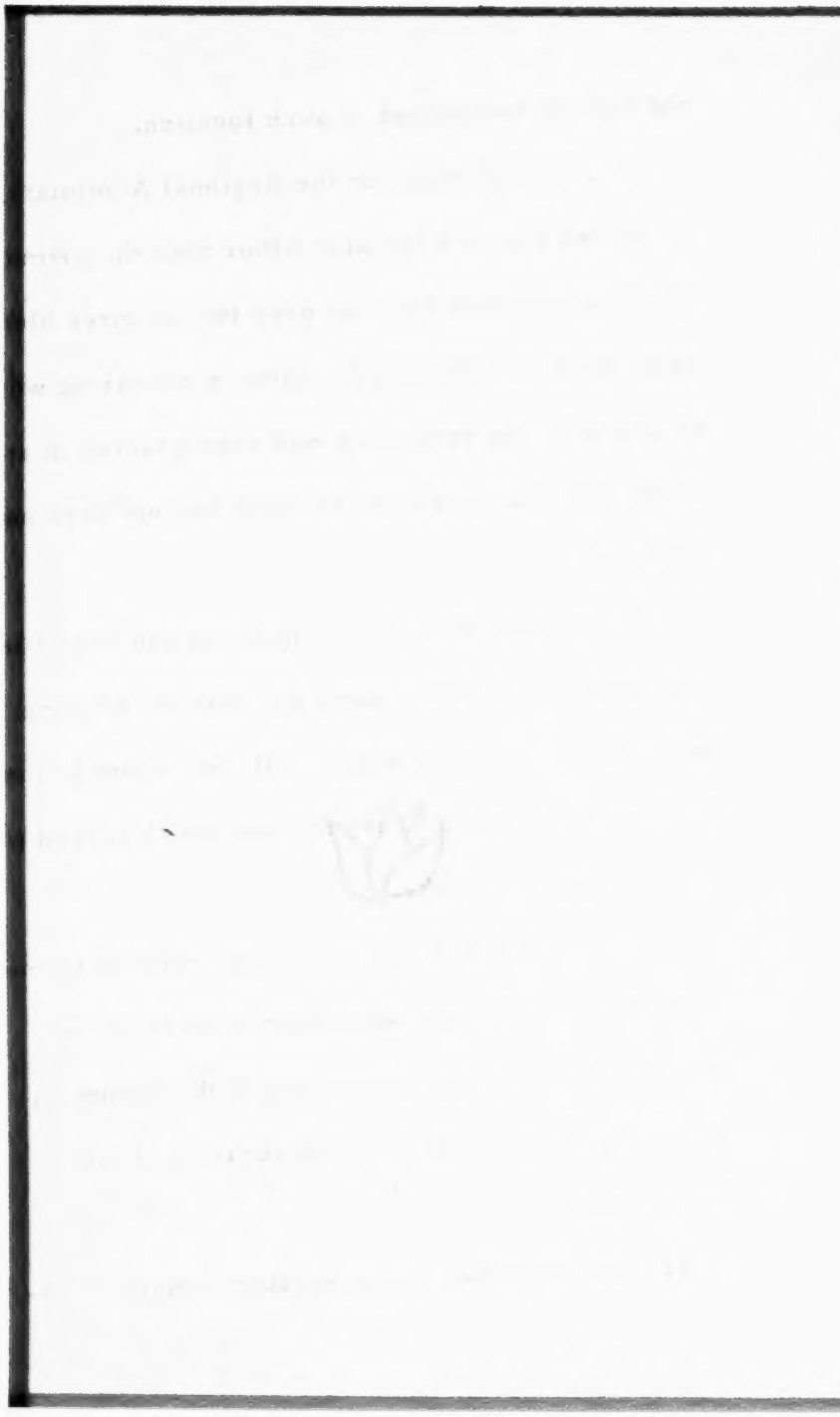
not have to be notified of such location.

18. The attorney for the Regional Administrator stated that if a location other than the primary location was used and was over two or three blocks away from the primary location, a rehearing would be granted. No rehearing was ever granted in spite of the fact that a definite location had not been established.

19. Certain preliminary motions had been filed and were heard on the same day that the hearing was held on the application. All time spent in the hearing of the preliminary motions was charged to to the contestant banks.

20. The Regional Administrator refused to inform the plaintiff bank and other contestants of what material he was forwarding to the Comptroller in Washington for the consideration of the Comptroller.

21. The Regional Administrator refused to re-



veal to the Contestants, and particularly to this plaintiff bank, what material had not been placed in the public file and why it had not been placed therein, and further, why it had been declared confidential.

22. When the plaintiff, Bank of Commerce of Laredo, was advised that a hearing was to be held on February 8, 1972, the President of that Bank asked for additional time. The plaintiff was not granted such time and at the request of the Union National Bank, the hearing was extended only for one week to February 15, 1972. These facts are completely contradictory to that statement contained in the Brief of the Comptroller wherein it is stated on page 4 that 'Pursuant to the request of protestant, Bank of Commerce, a hearing was scheduled before the Comptroller's Regional Administrator in Dallas, Texas, for February 15, 1972.'

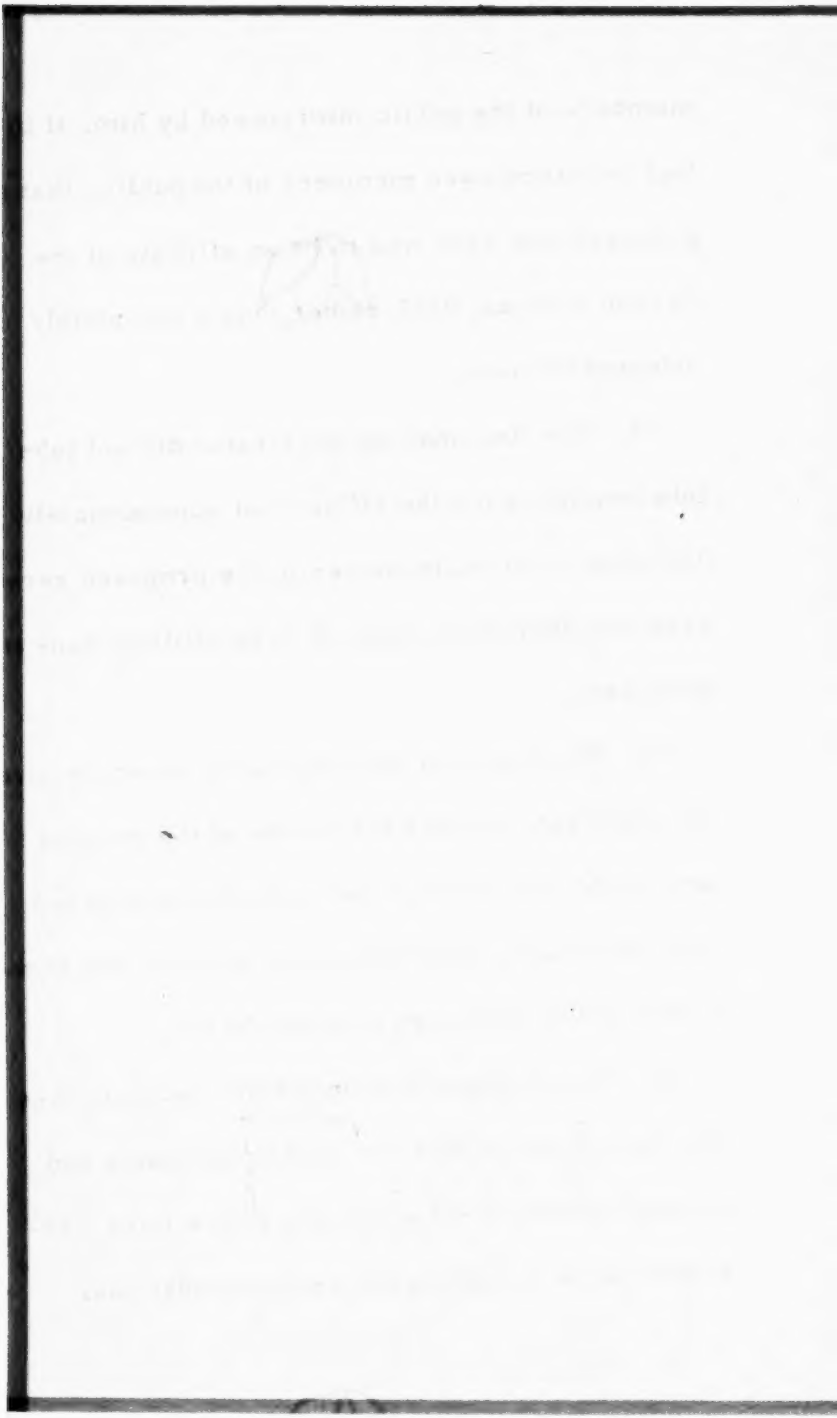
23. The field investigator withheld from the

members of the public interviewed by him, if in fact he interviewed members of the public, that the proposed new bank was to be an affiliate of the Laredo National Bank rather than a completely independent bank.

24. The Regional Administrator did not take into consideration the affidavit of approximately fifty prominent businessmen in the proposed service area that they were opposed to an affiliate bank in their area.

25. The Regional Administrator never required the applicants to state the names of the persons who would own stock in the corporation in order that contestants could determine wherein the ownership of this proposed bank would lie.

26. The Regional Administrator failed to take into consideration that the field investigator had actually counted the Laredo Air Force Base Personnel twice in making his recommendations.



27. The Regional Administrator failed to take into consideration that the Laredo National Bank has a branch banking facility on the Laredo Air Force Base and that military and civilian personnel do not offer a source of potential customers to the affiliate bank.

28. The Regional Administrator permitted the applicants to include in their proposed service area the entire Laredo Air Force Base, whereas in truth and in fact, the Bank of Commerce is as easily accessible to the Laredo Air Force Base as the proposed new bank even if it is located at its primary stated location.

29. The Administrative File makes it evident that the Comptroller, in reaching his decision, completely disregarded the anti-competitive effect in the City of Laredo in granting a bank charter as an affiliate to the defendant, The Laredo National Bank.

30. The plaintiff Bank was advised by the Comptroller as follows: 'The record indicates that you had filed comments in connection with the subject application. We wish to advise you that the application has been approved.' In truth and in fact, the application had been conditionally approved, but the plaintiff, Bank of Commerce of Laredo, was never so advised and did not know of the conditions attached until they were furnished with copies of the Administrative File by the Court. (See pages 6 and 7 of the Administrative File).

31. The Comptroller conditionally approved this application because it was as close an approximation of a branch bank as was feasible under the circumstances.

32. The Comptroller refused to make written findings of fact setting forth his reasons for the conditional approval of the Charter.

33. The entire administrative file shows

that the Comptroller acted on this application with undue haste.

34. The administrative file shows that the Regional Administrator expedited the hearing on this application because he was advised by the defendant Jacobs, 'that an attorney-promoter is reportedly getting a group of Mexican Nationals and Laredoans together with an intention of filing an ethnic national bank application.' (See p. 836 of the Administrative File).

35. The Administrative File further shows that the defendant, Jacobs, even requested the advice of the Regional Administrator in securing attorneys and economists in the field of bank applications.

36. The Regional Administrator refused to take into consideration the fact that charters for proposed savings and loans to be located in the same immediate area were pending or were to be

applied for prior to his ruling.

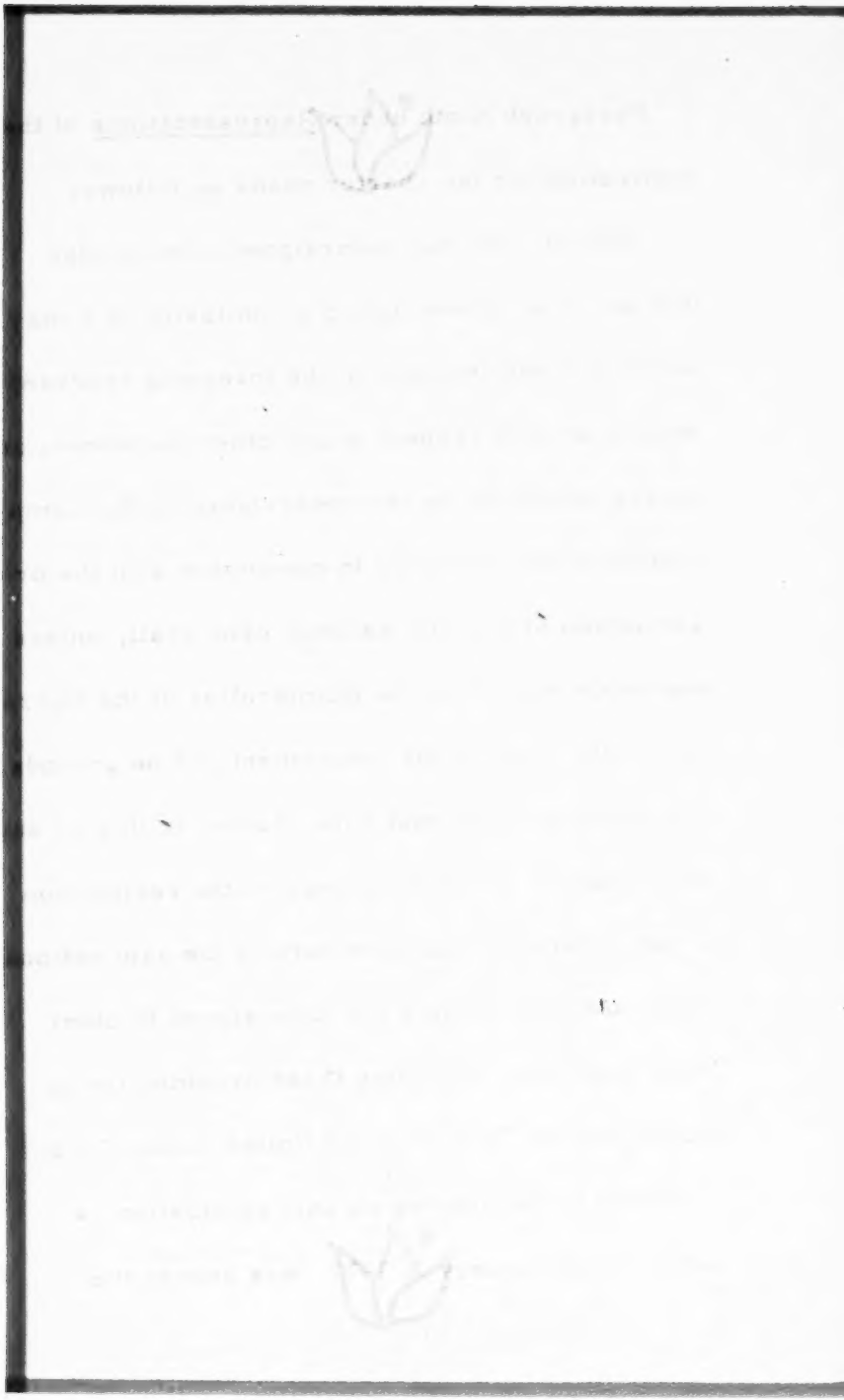
37. The defendant, Mandel, the man primarily responsible for the submission of the application for the proposed new bank, has testified under oath that if a charter for a new savings and loan, as well as a branch savings and loan to be operated in this same service area were granted, then the opening of this proposed bank would create excessive competition. These charters for a branch savings and loan and for a new and independent savings and loan have been granted. The applicants did not advise the Comptroller of this development not have they requested a withdrawal of their application."

Specifically, it was argued to the Court that the stated location of a proposed bank forms the basis for the entire economic survey of both the proponents and opponents of the application and is the primary factor in establishing need for a new bank.

Paragraph Ninth under Representations of the application for the charter reads as follows:

"NINTH, that the undersigned acknowledge that any misrepresentation or omission of a material fact with respect to the foregoing representations or with respect to any other documents or papers submitted by the undersigned to the Comptroller of the Currency in connection with the organization of the said national bank shall, unless expressly waived by the Comptroller of the Currency constitute fraud in the inducement and be grounds for denial of a national bank charter in this or any other matter, grounds to require the resignation of the undersigned as directors of the said national bank, and may subject the undersigned to other legal sanctions, including those provided for in Section 1001 of Title 18 of the United States Code."

Prior to the hearing on said application, a letter dated January 7, 1972, was sent to the

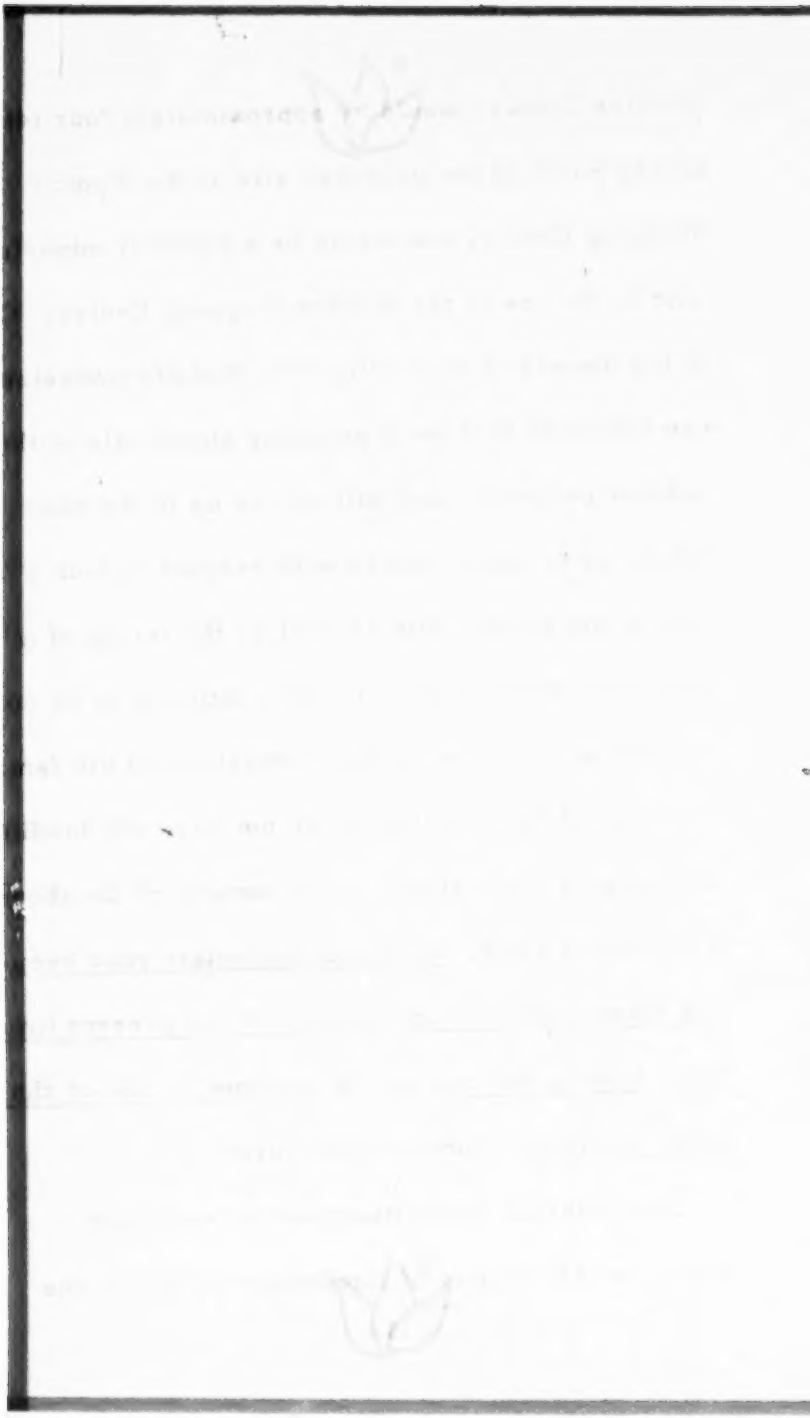


defendant, Michael Doman, Regional Administrator of National Banks, by Horace C. Hall, III, as agent for the applicants. Such letter appears on pages 387-388 of the Administrative File, Vol. 1. The attention of the Court is particularly directed to that paragraph of the letter which reads as follows:

"In addition to the site at the Woolco Shopping Center referred to in the addendum, and the letter from Mr. Roy L. Martin and Associates, attached to this letter, we have been in contact with and have discussed the possibility of securing either through purchase or through long term lease, both the premises and a bank building built to our specifications on a tract of land consisting of approximately two (2) acres and located between San Bernardo and the Western access road to Interstate Highway 35, at the Intersection of Calton Garden Road. This location would be immediately south across Calton Garden Road from the new Goodyear

Service Center, would be approximately four (4) blocks north of the proposed site at the Woolco Shopping Center, and would be a possibly superior site to the one in the Woolco Shopping Center. One of the owners of such site, Mr. Rodolfo Gonzalez, has indicated that he is securing appraisals of the subject property, and will advise us in the near future as to exact figures with respect to both a sale of the subject site as well as the terms of a long term lease of the site and a building to be constructed on such site by Mr. Gonzalez and his family. Because of the fact that we do not have any binding agreements from either of the owners of the above-referred to sites, we would appreciate your keeping these matters confidential for the present time until binding options can be obtained at one or the other location." (underlining ours).

The original application was accepted for filing on the 3rd day of December, 1971. At the



hearing on the application held before the defendant Doman, on February 15, 1972, the following conversation took place:

"MR. HORNBERGER: May I ask this one thing? Should, for example, that Mr. Hall's applicants decide the bank is not to be located at 4500 San Bernardo Avenue, if that is the address, then is the hearing to be reopened and we allowed to present additional economic information or would the hearing be closed and we just--

MR. PARISE: I think if you requested a rehearing, we would probably grant it. It depends on if they decide to change to another location whether or not that would affect the merits of the application. If it's just two or three blocks, I wouldn't necessarily think--

MR. HORNBERGER: Five blocks, I think. I don't think the public file will reveal now as to a question of changing from one location to another.

It's a question of we don't have a location.

MR. PARISE: I think that's not true. The applicants have stated they are proceeding on the assumption the bank would be located on the 4500 San Bernardo. Is that not right, Mr. Hall?

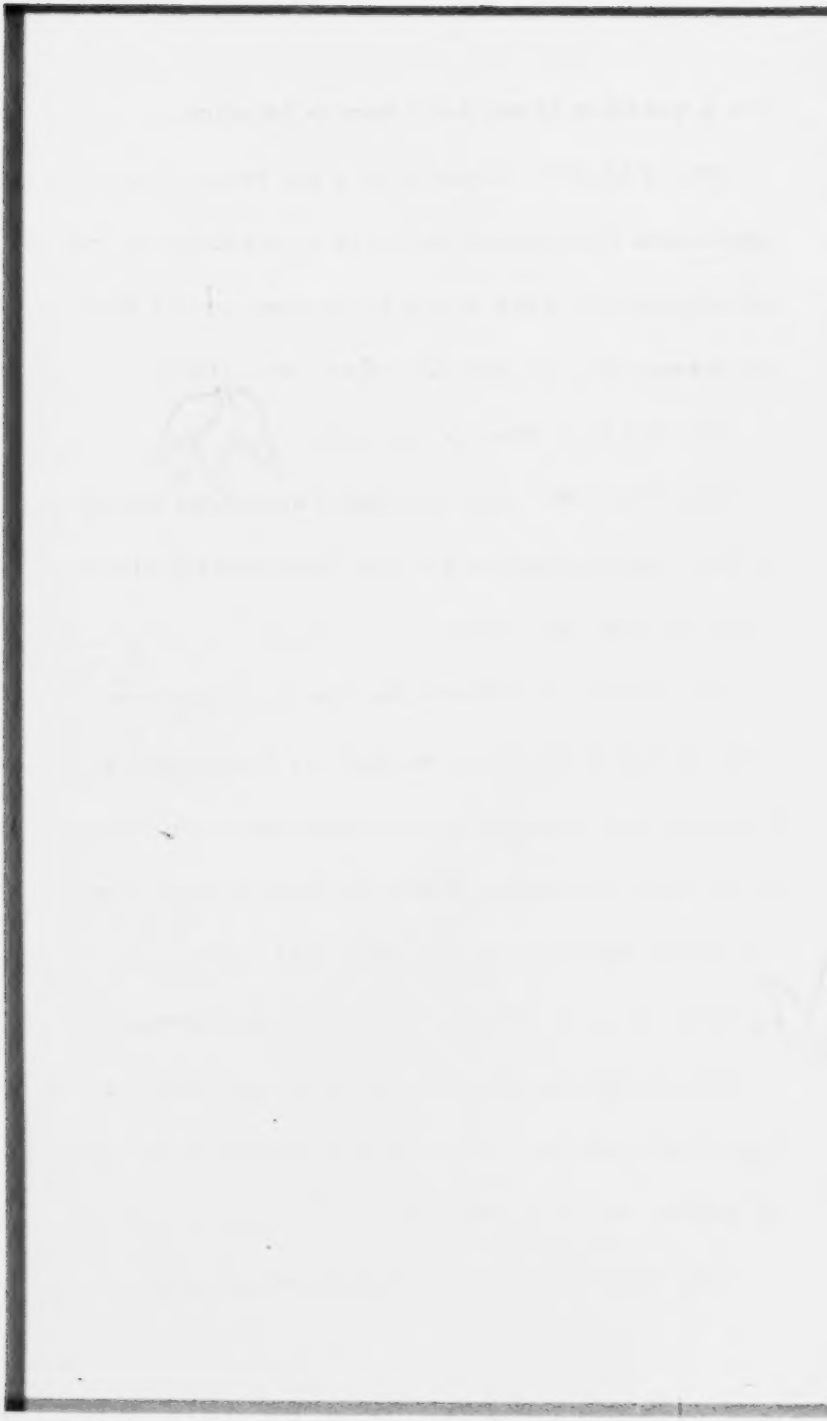
MR. HALL: That is correct.

MR. PARISE: And our application was based on that representation and the field investigators assumed that, so I think--

MR. HALL: I believe the file in connection with the letter that was marked as Protestant's Exhibit 4 had attached to it originally a copy of the letter from the owner at the location of 4500 San Bernardo advising us that we would come to an agreement as to location there at that address.

MR. DOMAN: Mr. Hornberger, the application filed with the Comptroller requests a vicinity be stated, which it was done.

MR. HORNBERGER: That the what, sir?



MR. DOMAN: The application does, in fact, reflect the vicinity or location. Do you have any dispute with that, Mr. Hornberger?

MR. HORNBERGER: No, sir.

MR. DOMAN: OK.

MR. HORNBERGER: I think the application states the location.

MR. DOMAN: The summary of information to be submitted to the Regional Comptroller of the Currency in this office within 30 days of filing requests that a description of the service area be provided. Do you dispute that this was provided?

MR. HORNBERGER: Well, I dispute what they set out as a service area is a service area. I don't dispute these facts that they out of thin air picked a service area.

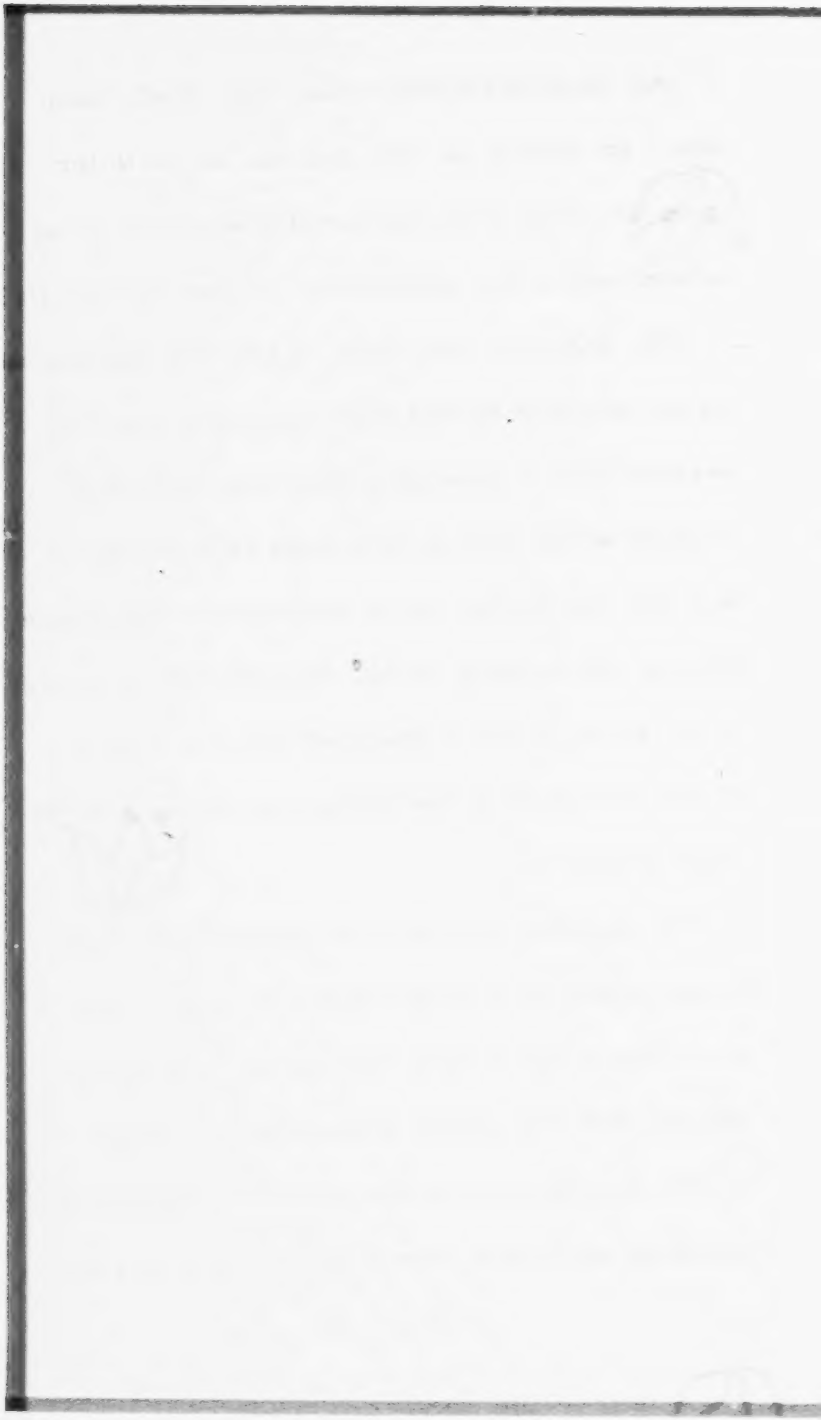
MR. DOMAN: Mr. Hornberger, this morning, then, we are dealing with a specified service area and location, and I believe that is what the record shows.

MR. HORNBERGER: Yes, sir. Well, then, what I am getting at, Mr. Doman, is the letter from Mr. Hall dated January 7th would not be an amendment to the application. Is that correct, sir?

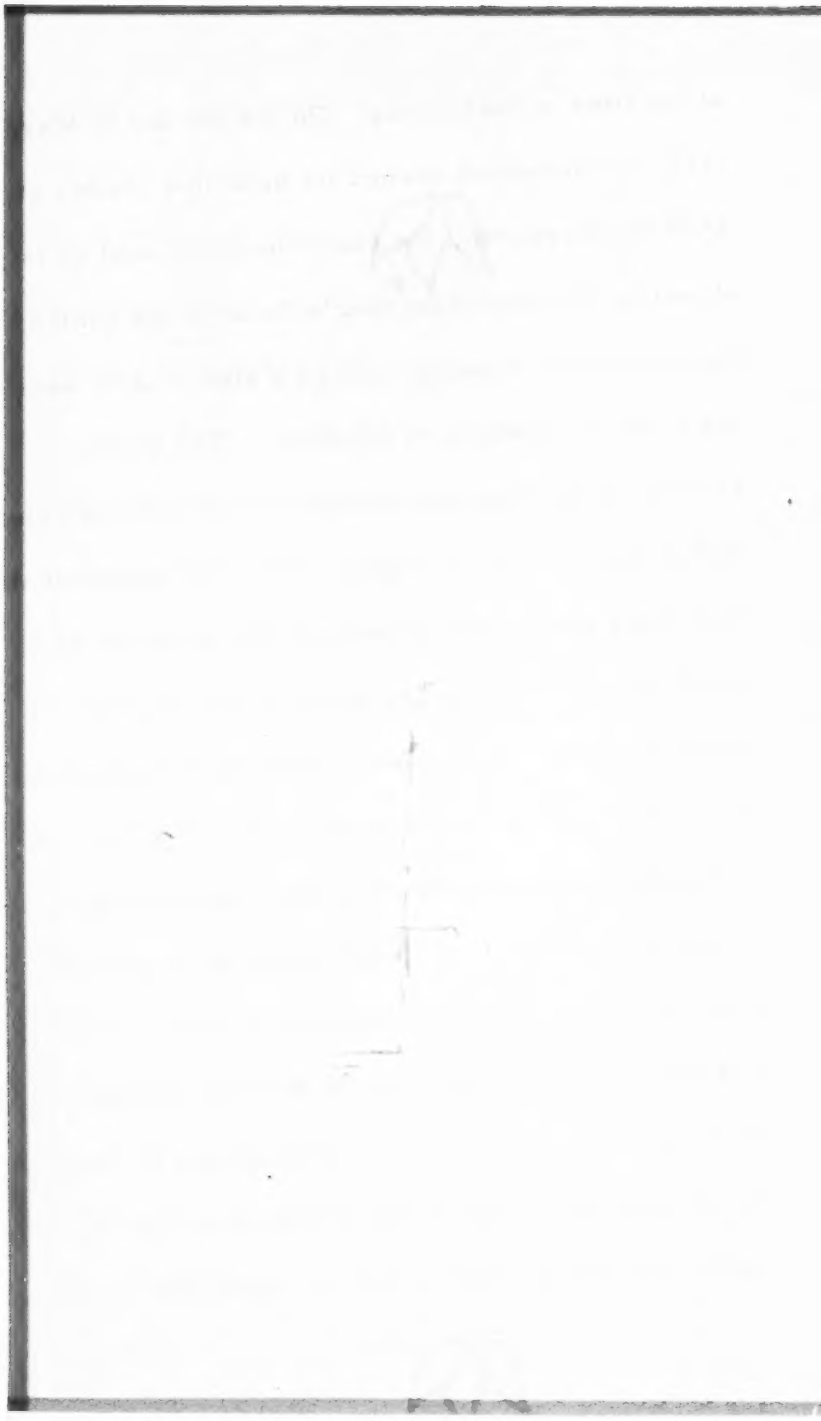
MR. DOMAN: Mr. Hall, again, the application as we review it by this office covers a specified service area, a location within--any individual location within that service area really more or less just fulfills the entire application, but we are dealing with banking needs, the convenience needs of the public within a specified service area." (Pages 12 thru 14 of the Transcript-Hearing on the application).

The appellee bank has now opened in a trailer house located at 4500 San Bernardo Avenue and maintains a sign outside that trailer stating specifically that this is only a temporary location.

The Administrative File clearly shows that the defendant applicants did not have a fixed location



at the time of the hearing. On the 4th day of May, 1973, the defendant opened its bank in a trailer at 4500 San Bernardo, the stated location, and as is shown by Plaintiff-Appellant's Brief to the United States Court of Appeals, placed a sign outside saying it was a "temporary location." The public records of the Regional Administrator now indicate that on the 3rd day of August, 1973, the Respondents filed their application to remove the proposed location to a point 1.2 miles north of the original stated location. To further compound the situation, on or about the 1st day of September, 1973, the Respondent requested the Regional Administrator to withhold action on the application for a period of thirty (30) days from September 4, 1973. To this date Plaintiff-Petitioner is still not advised of the permanent location for such proposed bank. All of these facts lead to the almost inescapable conclusion that at no time did the applicants intend



to locate the bank in the stated location. The Plaintiff-Petitioner desired to take depositions of the interested parties to ascertain if, in fact, intentional misstatements in the application had been made. To deny the Petitioner this right, on the facts before this Honorable Court, would permit future applicants to mislead the public, other banks, the Comptroller and the Courts to the extreme detriment of the interests of the banking industry and the general public.

In Warren Bank v Saxon, 263 FS 34, United States District Court for the Eastern District of Michigan, S. D., 1966, the Court stated:

"Plaintiff has the cart before the horse. Plaintiff wants to depose the Comptroller to expose wrongdoing. The law is the other way around. If Plaintiff can show wrongdoing (not in the sense of proving it, but merely showing

circumstances that to a reasonable view would indicate sham, subterfuge or similar wrong) he may then depose the Comptroller as required. Bank of Dearborn, supra."

In Bank of Dearborn vs Saxon, 244 FS 394, United States District Court, for the Eastern District of Michigan, S. D., 1965, the Court stated:

"The authorities do not support the application of the privilege claimed to the facts before us. This is not the frivolous claim of an idle mischief maker. This is a citizen who has presented sufficient facts to warrant searching inquiry."

In Camp vs Pitts, __US__, 36 L Ed 2d 106, 93 S Ct __

the Supreme Court refers at length to the case of Citizens to Preserve Overton Park, Inc., et al vs John A. Volpe, Secretary, Department of

Transportation, et al, 401 US 402, 28 L Ed 2d 136, 91 S. Ct. 814. The Overton Park case involved a decision by the Secretary of Transportation to permit a highway to be constructed through a public park in Memphis, Tennessee. The announcements approving the route and design of the highway were not accompanied by formal findings of fact, nor did the Secretary state why he believed there were no feasible and prudent alternative routes or why design changes could not be made to reduce harm to the park.

On Certiorari the Court held that:

"(1) The Secretary of Transportation was not required to file formal findings, under either Sec. 4 (f) of the Department of Transportation Act of 1966 of Sec. 138 of the Federal-Aid Highway Act of 1968, that there were no feasible and prudent alternatives to routing the highway through the park prior to his approving the design and route,

(2) judicial review of the Secretary's action was inadequate, however, because it was based solely on litigation affidavits, (3) petitioners were entitled to seek judicial review of the Secretary's action (4) Congress had not sought to prohibit judicial review nor to restrict judicial review of the secretary's action, (5) the Secretary's action did not fall within the exception in Sec. 701 of the Administrative Procedure Act prohibiting judicial review of agency actions committed to agency discretion by law, (6) the use of federal funds for the construction of highways through parks was barred, except in the most unusual circumstances, by the language of Sec. 4 (f) of the Department of Transportation Act of 1968, (7) Congress intended by those Acts to give theprotection of parklands paramount importance and preference over such other factors as cost and community disruption (8) although a de novo review was not required, the reviewing

court should engage in a substantial inquiry as to whether the Secretary acted within the scope of his authority, whether he considered the relevant factors in reaching his decision, whether there had been a clear error of judgment, and whether the necessary procedural requirements were followed, (9) judicial review should be based on the full administrative record before the Secretary at the time he made his decision, and (10) while inquiry into the mental processes of administrative decisionmakers should usually be avoided, the District Court, on remand, could make such an inquiry if that should prove to be the only way effective judicial review could be had."

In its opinion, the Court in the Overton case stated as follows:

"Even though there is no de novo review in this case and the Secretary's approval of the route of I-40 does not have ultimately to meet the

substantial-evidence test, the generally applicable standards of Sec. 706 require the reviewing court to engage in a substantial inquiry. Certainly, the Secretary's decision is entitled to a presumption of regularity. See e.g. Pacific States Box & Basket Co. v White, 296 U.S. 176, 185, 80 LED 138,146, 56 S. Ct. 159 (1935); United States v Chemical Foundation 272 US 1, 14-15 71 L ED 131, 142, 143, 41 S. Ct. 1 (1926). But that presumption is not to shield his action from a thorough, probing, in-depth review."

"Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706 (2) (A) requires a finding that the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 USC Section 706 (2) (A) (1964 ed., Supp. V). To make this finding the Court must consider

whether the decision was based on a consideratin of the relevant factors and whether there has been a clear error of judgment. Jaffe, Supra, at 182. See McBee v Bomar, 296 F2d 235, 237 (CA6 1961); in re Josephson, 218 F2d 174, 182 (CA 1 1954); Western Addition Community Organization v Weaver, 294 F Supp. 433 (ND Cal 1968). See also Wong Wing Hang v Immigration and Naturalization Serv., 360 F2d 715, 719 (CA 2 1966). Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."

"Undoubtedly, review of the Secretary's action is hampered by his failure to make such findings, but the absence of formal findings does not necessarily require that the case be remanded to the Secretary.

Thus it is necessary to remand this case to

the District Court for plenary review of the Secretary's decision. That review is to be based on the full administrative record that was before the Secretary at the time he made his decision. But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.

"The court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decision-makers is usually to be avoided. United States v Morgan, 313 US 409, 422, 85 L ED 1429, 1435, 61 S. Ct. 999 (1941). And where there are administrative findings that were made

at the same time as the decision, as was the case in Morgan, there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves. See Shaughnessy v Accardi, 349 US 280, 99 L ED 1074, 75 S. Ct. 746 (1955).

"The District Court is not, however, required to make such an inquiry. It may be that the Secretary can prepare formal findings including the information required by DOT Order 5610.1 that will provide an adequate explanation for his action. Such an explanation will, to some extent, be a 'post hoc rationalization' and thus must be viewed critically. If the District Court decides that additional explanation is necessary, that could should consider which method will prove the most

expeditious so that full review may be had as soon as possible."

In the Pitts case the Supreme Court stated:

"We agree with the Comptroller that the trial procedures thus outlined by the Court of Appeals for the remand in this case are unwarranted under present law."

"Accordingly, the proper standard for judicial review of the Comptroller's adjudications is not 'the substantial evidence' test which is appropriate when reviewing findings made on a hearing record. 5 U.S.C. Sec. 706 (2) (E). Nor was the reviewing court free to hold a de novo hearing under Sec. 706 (2) (F) and thereafter determine whether the agency action was 'unwarranted by the facts.' It is quite plain from our decision in Citizens to Preserve Overton Park v Volpe, 401 U.S. 402 (1971), that de Novo review is appropriate only where there are in-

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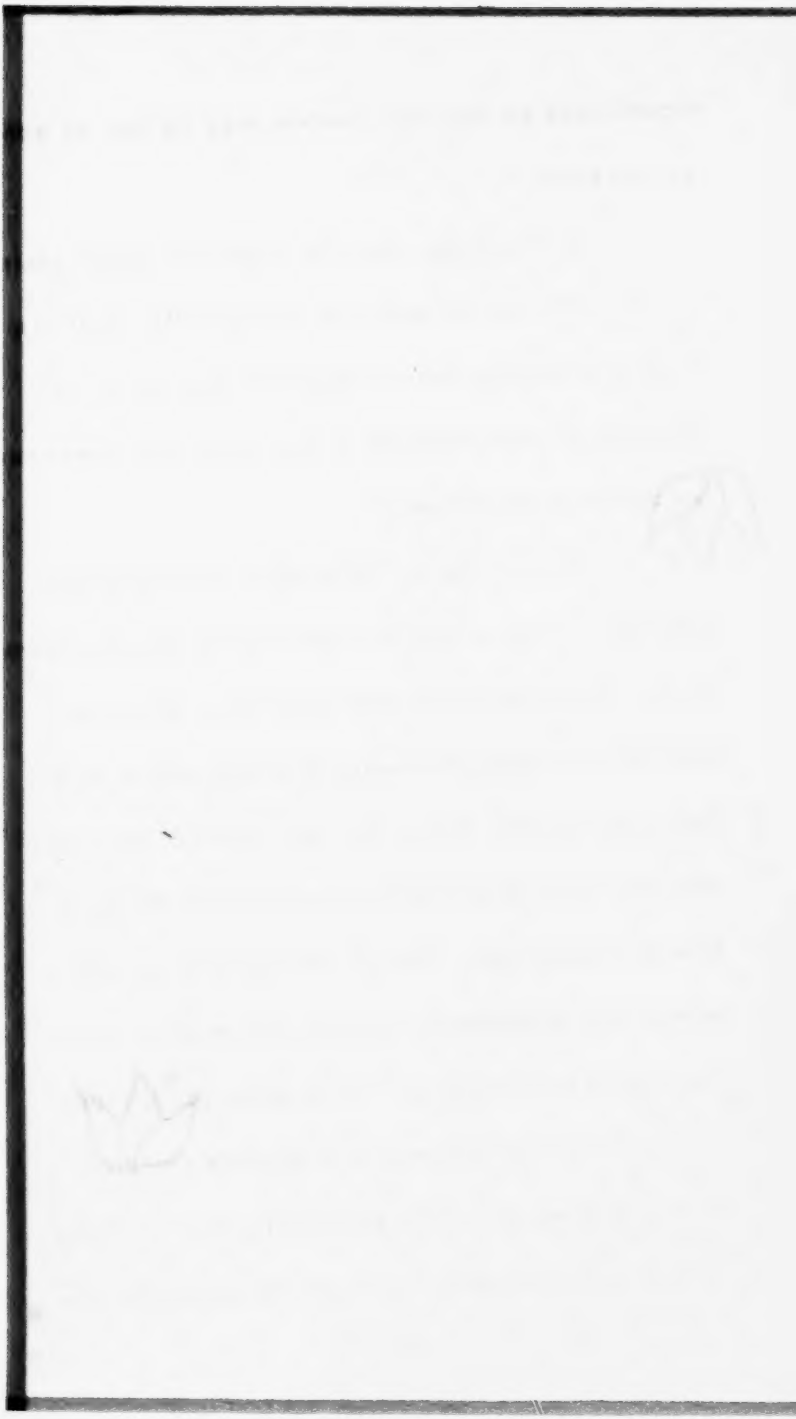
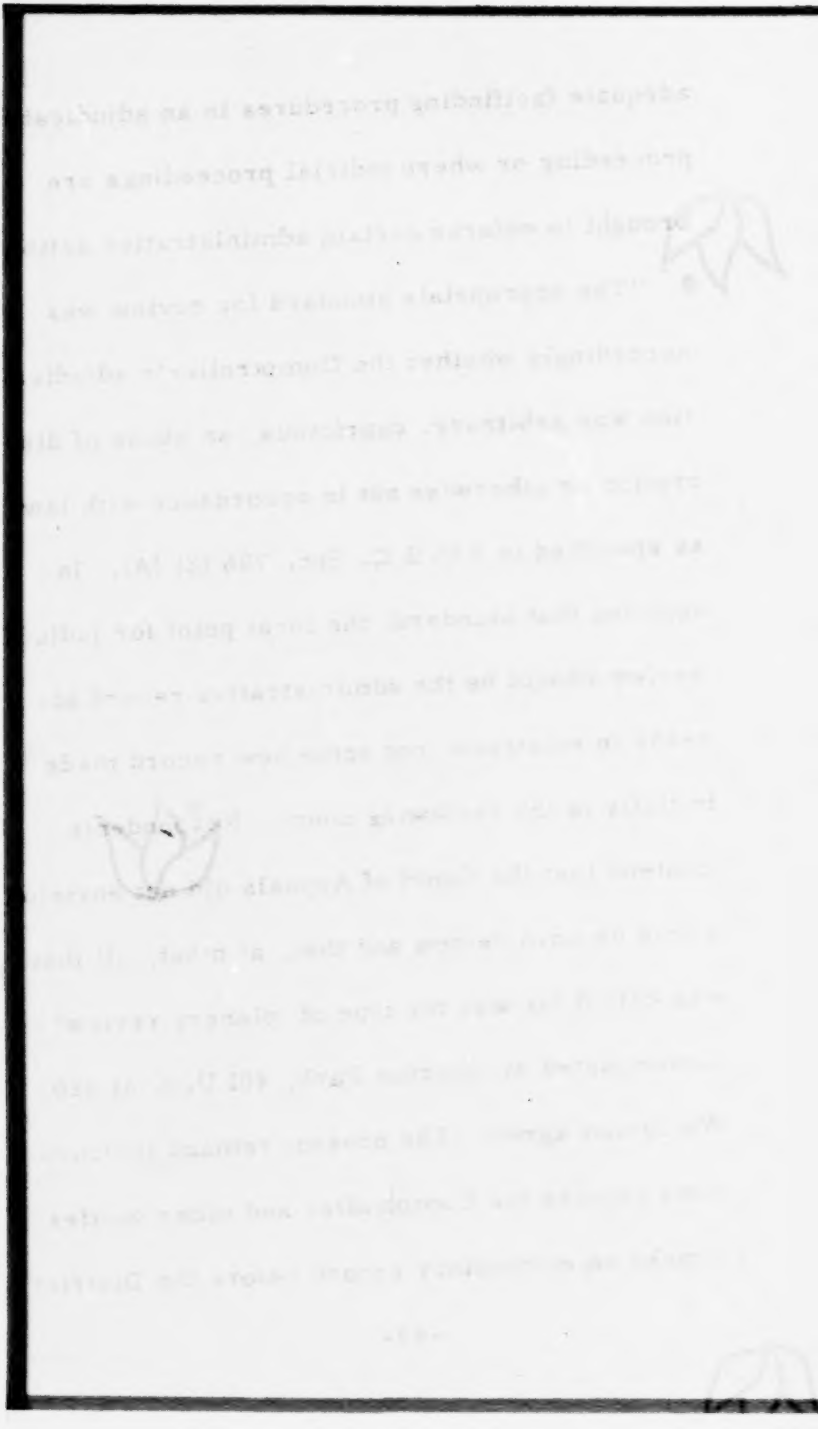


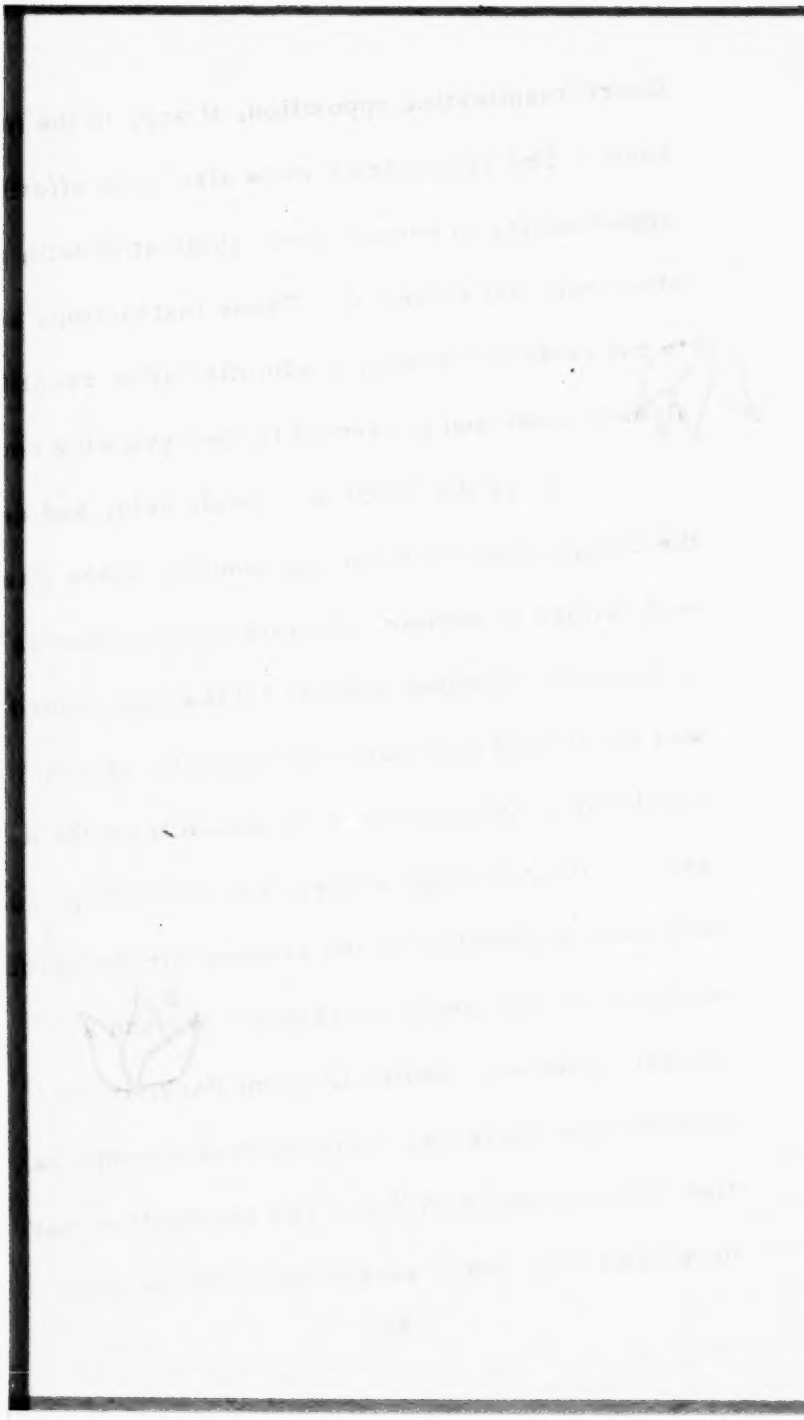
adequate factfinding procedures in an adjudicatory proceeding or where judicial proceedings are brought to enforce certain administrative actions.'

"The appropriate standard for review was accordingly whether the Comptroller's adjudication was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law,' as specified in 5 U.S.C. Sec. 706 (2) (A). In applying that standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court. Respondents contend that the Court of Appeals did not envision a true de novo review and that, at most, all that was called for was the type of 'plenary review' contemplated by Overton Park, 401 U.S. at 420. We cannot agree. The present remand instructions require the Comptroller and other parties to make an evidentiary record before the District



Court 'manifesting opposition, if any, to the new bank.' The respondents were also to be afforded opportunities to support their application with any other relevant evidence.' These instructions seem to put aside the extensive administrative record already made and presented to the reviewing court.'

"If, as the Court of Appeals held, and as the Comptroller does not now contest, there was such failure to explain administrative action as to frustrate effective judicial review, the remedy was not to hold a de novo hearing, but, as contemplated by Overton Park, to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary. We add a caveat, however. Unlike Overton Park, in the present case there was contemporaneous explanation of the agency decision. The explanation may have been curt, but it surely indicated the deter-



minative reason for the final action taken; the finding that a new bank was an uneconomic venture in light of the banking needs and the banking services already available in the surrounding community. The validity of the Comptroller's action must, therefore, stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideration. See SEC vChenery Corp., 318 US 80 (1943). It is in this context that the Court of Appeals should determine whether and to what extent, in the light of the administrative record, further explanation is necessary to a proper assessment of the agency's decision.

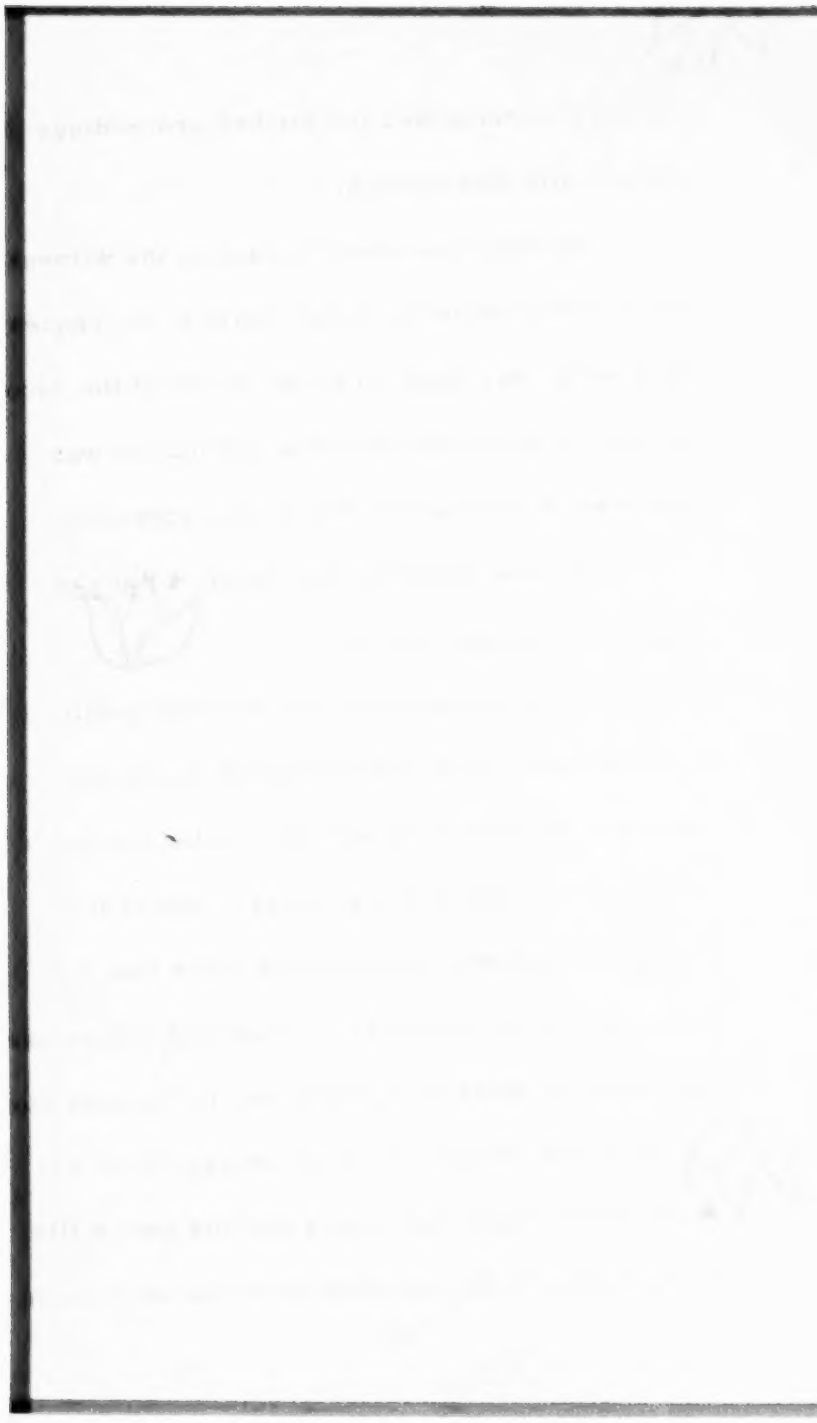
The petition for certiorari is granted, the judgment of the Court of Appeals is vacated, and

the case is remanded for further proceedings consistent with this opinion."

Specific questions to each of the witnesses were submitted to the Trial Court at his request. No attempt was made to go far afield of the record, but only to ascertain why this application was approved in the manner that it was approved.

As was stated by the Court in Bank of Dearborn v Saxon, supra:

"It would seem that the real public interest under such circumstances is not the agency's interest in its administration but the citizen's interest in due process. Indeed it might be said with considerable force that the issue before us, a charge of sham and subterfuge employed by those in high places, is the very kind of issue with respect to which an aggrieved administrator might well insist that his entire file in the matter under scrutiny (save for what might



properly be called business secrets) be spread on the public record so that the falsity of the charge might be made manifest of all who cared to read. This the Administrator, however, has refused to do."

In Bank of Dearborn v Saxon, supra, the Court stated:

"And, so far as the Comptroller's claim of privilege may involve a prohibition against probing his mental processes, we agree with the Fourth Circuit that 'the mental process rule is but'one facet of the general presumption of regularity' which attaches to decisions of administrative bodies, 2 Davis, Administrative Law (1950), Section 11.06, 0.63 and that where a prima facie case of misconduct is shown, 'justice requires that the mental process rule be held inapplicable,' citing among other authorities, Union Savings Bank of Patchogue, New York v Saxon, D. C., 209 F Supp. 319 (1962)."

In Webster Groves Trust Co. v Saxon, 370 F2 381, Court of Appeals, Sixth Circuit, 1966, the Court stated:

"Therefore, we do not believe the courts are powerless to protect the public from unconstitutional, illegal, or otherwise arbitrary activities of administrative officials."

The Court further stated:

"The Comptroller is also asserting that a competitor has no standing to object to lawful competition. With this rule we find no fault, but the banks surely have the standing to object to illegal competition. Frost v Corporation Commission of Oklahoma, 278 U.S. 515, 49 S. Ct. 235, 73 L. Ed. 483 (1929); National Bank of Detroit v Wayne Oakland Bank, 252 F2d 537 (6Cir. 1958), cert. denied 358 U.S. 830, 79 S. Ct. 503. Therefore, when a competitor believes he is being subjected to illegal competition owing to impropriety

by the Comptroller, the courts should be open to hear and decide the alleged wrong. The trial court was vested with jurisdiction over the subject matter of this litigation.

"Thus though there is ample authority for review of the Comptroller's actions in granting authorization for branch banks, there are no cases holding a right to judicial review of the Comptroller's actions in granting a new bank charter. We recognize that this is an expanding field of the law and that the trend is for the courts to grant some type of judicial review in many of these administrative type proceedings which concern the granting of licenses, personal rights, and privileges. While the courts have generally refused to review the actions of executive and administrative officials in the conduct of military and foreign affairs, Martin v Mott, 12 Wheat. 19, 25 U.S.19, 6 L.Ed. 537 (1827); Orloff v Willoughby, 345 U.S. 83, 73

S. Ct. 534, 97 L. Ed. 842, (1953); National City Bank of New York v Republic of China, 348 U.S. 356, 75 S. Ct. 423, 99 L. Ed. 389 (1955) they have, in areas of commerce (granting licenses, charters and permits) and in actions involving personal liberty, (travel, use of the mails) tended to exercise a brand of limited review. Although the language may vary from case to case as the situation demands, still it is clear that courts do, when the occasion demands, give a limited review to administrative actions even though the administrative action is termed 'discretionary.' American School of Magnetic Healing v McAnnulty, 187 U.S. 94, 23 S. Ct. 33, 47 L. Ed. 90 (1902); Kent v Dulles 357 U.S. 116, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958); Friedman v Schwellenbach, 81 U.S. App. D.C. 365, 159 F2d 22 (1946), cert. denied 330 U. S. 838, 67 S. Ct. 979, 91 L Ed. 1285; Great Western Packers Express, Inc. v United States, 246

F. Supp. 151 (D. Colo. 1965); Union Cartage Company v United States, 244 F. Supp. 1005 (D. Mass. 1965). The action of the Comptroller herein would seem to fall into the general commercial area where discretionary actions are subject to limited review.

"This belief is supported in part by the Supreme Court's comments in Whitney National Bank in Jefferson Parish v Bank of New Orleans, 379 U.S. 411, 85 S. Ct. 551, 13 L Ed 2d 386 (1965) a Bank Holding Company Act case wherein Mr. Justice Clark, speaking for the majority, said at page 423, 85 S. Ct. at page 559:

> 'We do not say that under no circumstances may the Comptroller be restrained in equity from issuing a certificate to a new bank. * * *'

and by Mr. Justice Douglas's dissent at pages 427, 428, 85 S. Ct. at page 561, where he touches

upon the broad issues involved in this case at bar, using the following language:

'* * *But, as stated by the Solicitor General, 'The National Bank Act * * * makes no provision for an administrative hearing or for judicial review, and the Comptroller's decisions are made informally, without an administrative record.' The courts, however, have held that judicial cognizance of a controversy with the Comptroller may be taken and judicial power exercised to keep the Comptroller within statutory bounds. Camden Trust Co. v Gidney, 112 U.S. App. D.C. 197, 301 F2d 521; Union Savings Bank v Saxon, 118 U.S. App. D.C. 296, 298, 335 F2d 718, 720 and cases cited. That conclusion is consistent with our holding in Columbia Broadcasting System Inc. v United States, 316 U.S. 407, 423-424 (62 S.Ct. 1194, 86 L.Ed. 1563), that, absent a congressional design to bar all judicial

review (Switchmen's Union (of North America) v National Mediation Board, 320 U.S. 297, (64 S. Ct. 95, 88 L. Ed. 61), injunctive relief is available where administrative remedies are either inapplicable or inadequate. This rule keeps the Comptroller from being a free-wheeling agency dispensing federal favors; and it gives some assurance that he will render principled decisions within the rule of law laid down by Congress.

"The Comptroller, however, must be subordinate to the law from which he received his authority, and is subject to the limitations imposed by that law. Therefore, if he acts in excess of his statutory grant of power, acts arbitrarily or capriciously, abuses his discretion, or unlawfully discriminates in violation of the Constitution, he is certainly subject to restraint by the courts. Though he may exercise the discretion the expertise of his office affords him, the con-

gressional grant of authority does not empower arbitrary and capricious action, nor does it contemplate abuses of that discretion. Therefore, we do not believe the courts are powerless to protect the public form unconstitutional, illegal, or otherwise arbitrary activities of administrative officials. The Comptroller is free to exercise his discretion in the granting of charters, free from any review on the merits of his action. However, if the Comptroller acts in excess or abuse of his legal authority, to this extent his actions are subject to judicial review, with the burden of proof resting on the party seeking the review. This holding we believe to be consistent with Section 10 of the Administrative Procedure Act, 5 U.S.C. Section 1009, because no statute precludes judicial review, nor is this the type of agency action that is by law committed to agency discretion so as to be 'immunized from review by the exemption in the preface

of Section 1009'. First National Bank of Smithfield North Carolina v Saxon, supra, at page 270 of 352 F2d. Therefore, subsection 10 (c) of the Act, 5 U.S.C. Section 1009 (c) would be applicable. This subsection reads:

'Acts reviewable.

'(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.'"

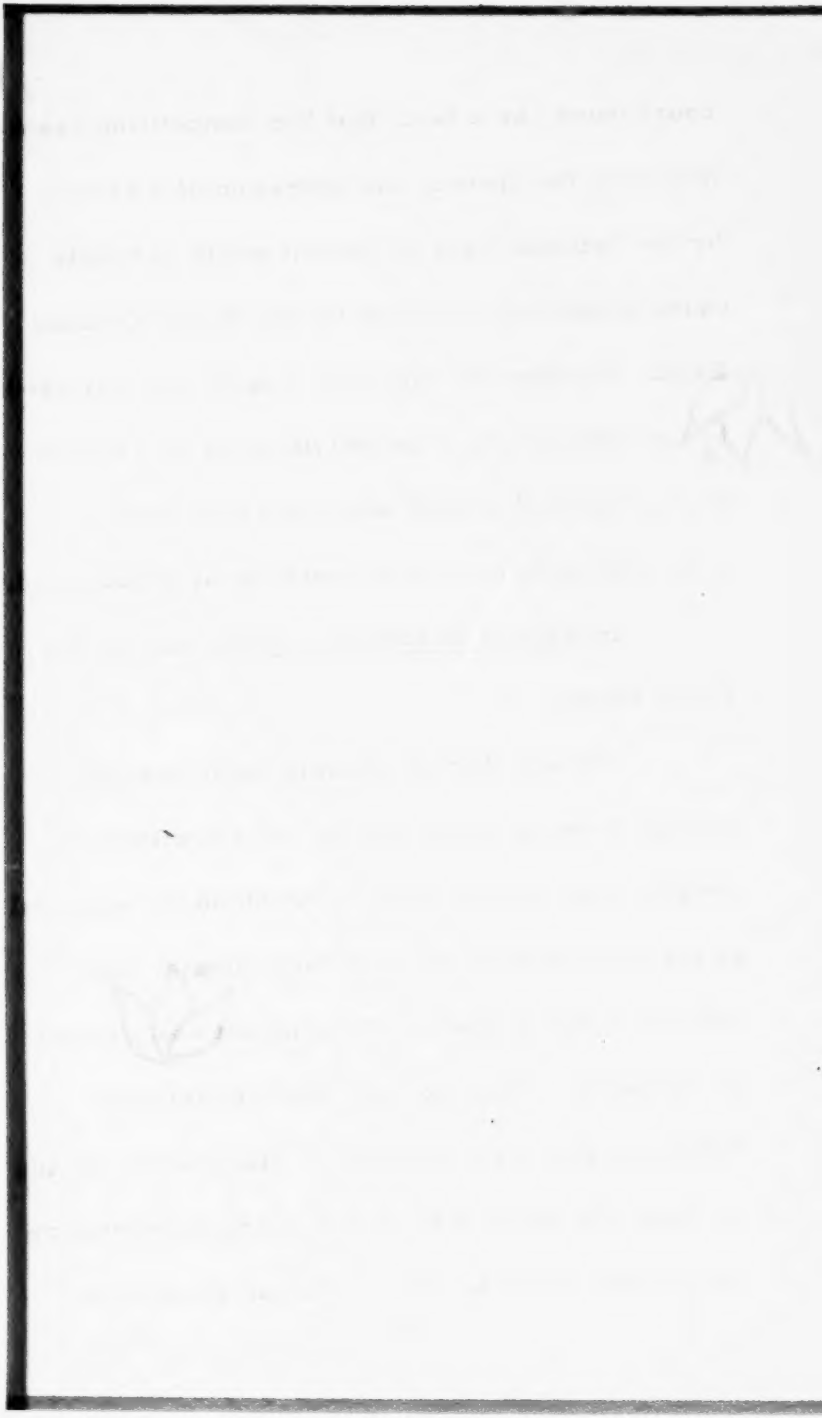
In National Bank of Detroit v Wayne Oakland Bank, 252 F 2d 537, United States Court of Appeals, Sixth Circuit, 1958, the Court stated:

"As to the standing of The Wayne Oakland Bank to maintain its suit, it was faced with invasion of property rights, and injury from a competition which was prohibited by the federal statutes subjecting national banks to the same rules of law as cover state banks. The distict

court found, as a fact, that the competition resulting from the opening and operation of a branch by the National Bank of Detroit would certainly cause inestimable damage to The Wayne Oakland Bank. Whether the rights of a party are infringed by unlawful action of an individual or by exertion of unauthorized federal administrative power, it is entitled to have such controversy adjudicated."

In Bank of Dearborn v Saxon, supra, the Court stated:

"To say that an administrator has discretion does not mean that he can act without reason, that he may grant or withhold his approvals as his uncontrolled caprices may dictate. No official in our system of Government has a power so awesome. Thus we have inquired into the Administrator's employment of his powers. Having so done, the whole plan (which we have heretofore described) becomes clear. He has abused his

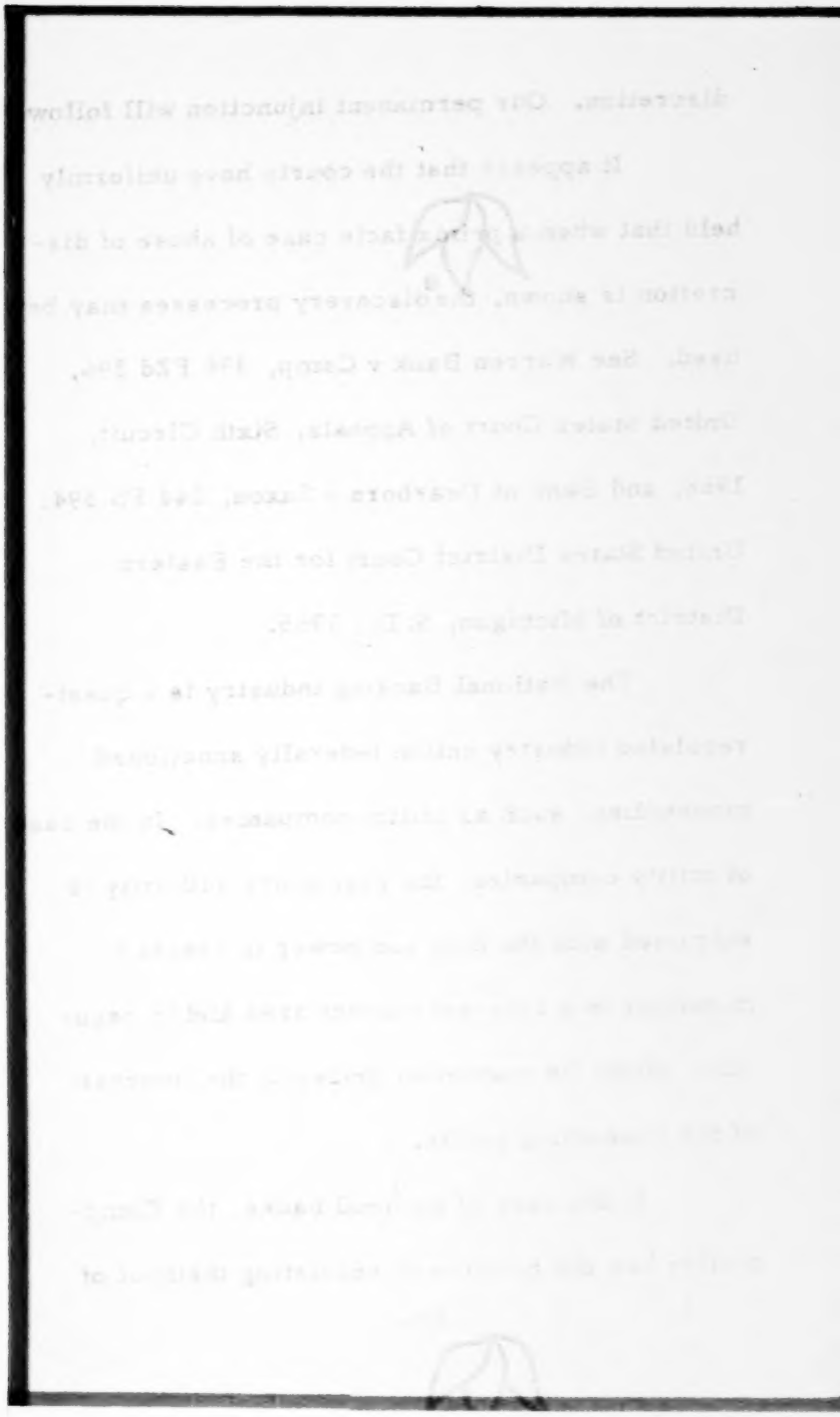


discretion. Our permanent injunction will follow."

It appears that the courts have uniformly held that when a prima facie case of abuse of discretion is shown, the discovery processes may be used. See Warren Bank v Camp, 396 F2d 396, United States Court of Appeals, Sixth Circuit, 1968, and Bank of Dearborn v Saxon, 244 FS 394, United States District Court for the Eastern District of Michigan, S. D., 1965.

The National Banking industry is a quasi-regulated industry unlike federally sanctioned monopolies, such as utility companies. In the case of utility companies, the regulatory authority is entrusted with the duty and power to create a monopoly in a relevant market area and to regulate, albeit fix maximum prices in the interest of the consuming public.

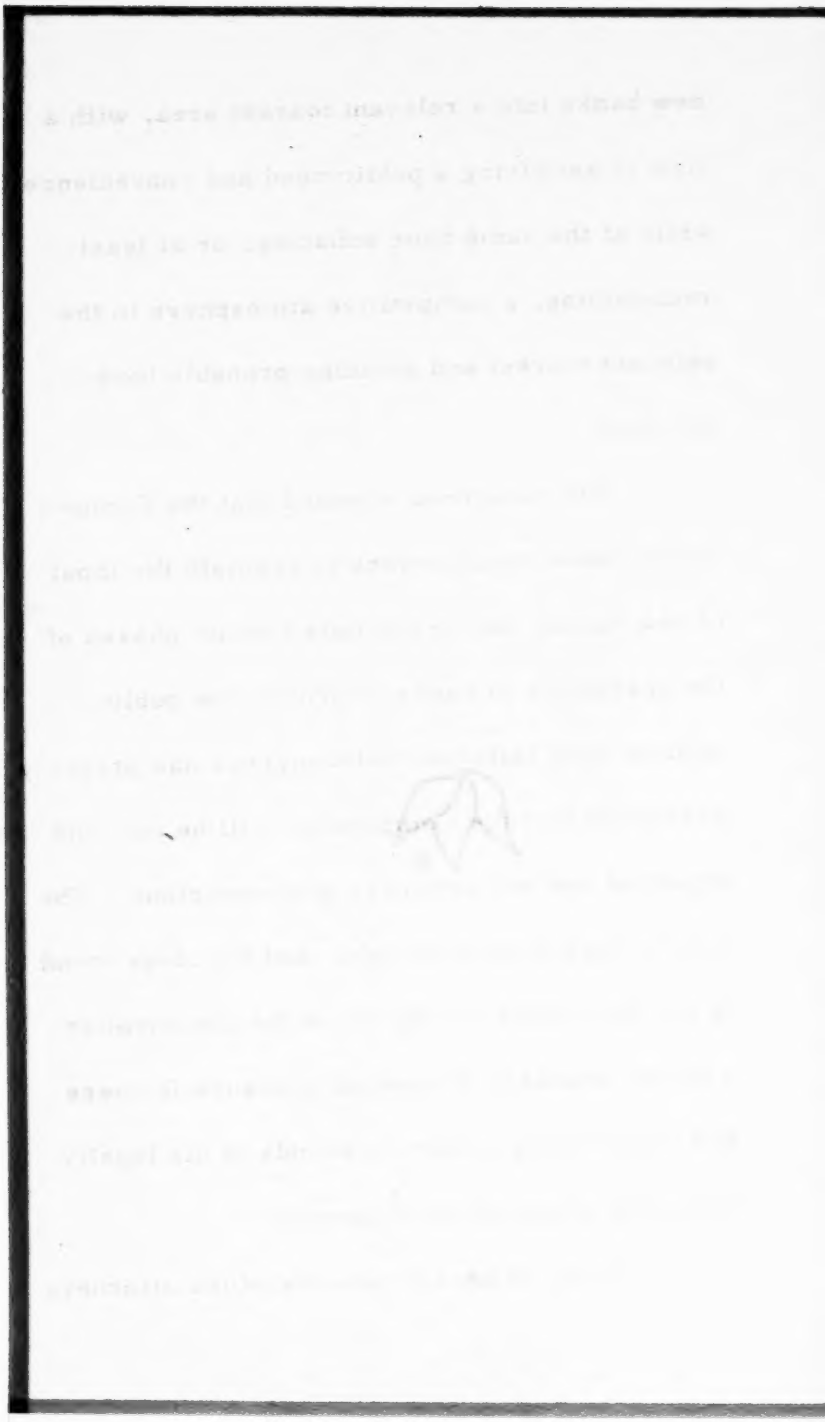
In the case of national banks, the Comptroller has the function of regulating theinput of



new banks into a relevant market area, with a view of satisfying a public need and convenience while at the same time enhacing, or at least maintaining, a competitive atmosphere in the relevant market and avoiding probable bank failures.

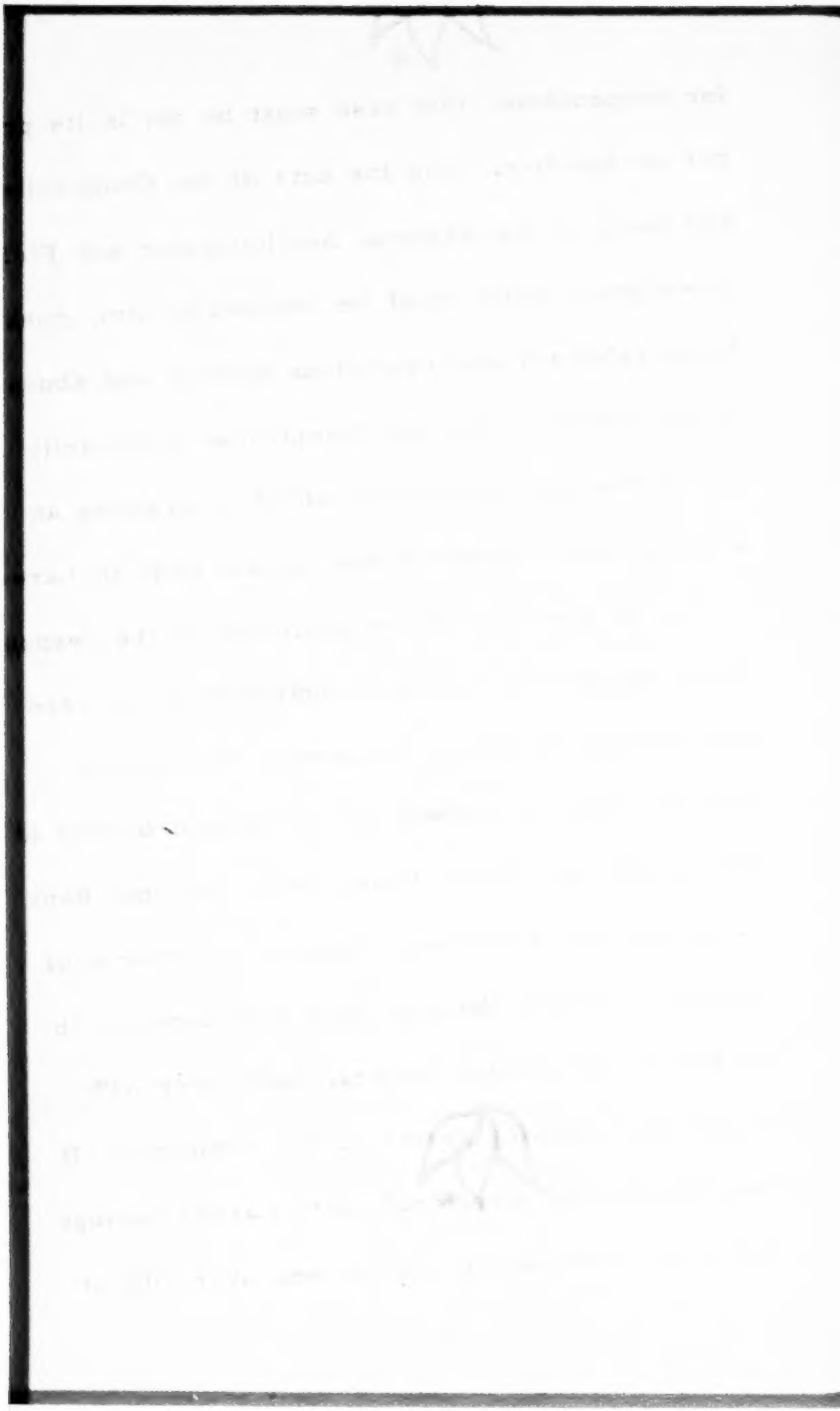
The Congress intended that the Comptroller have broad powers to regulate the input of new banks, and to regulate certain phases of the operations of banks to protect the public against bank failures, but Congress has properly presumed that the Comptroller will be fair and impartial and not arbitrary and capricious. The Courts have clearly so held, and the clear trend is for the Courts to require of the Comptroller a higher standard of conduct to insure fairness and impartiality within the bounds of his legally entrusted administrative powers.

Thus, to paraphrase one of the attorneys



for respondents, this case must be put in its proper perspective. Did the acts of the Comptroller and those of the Regional Administrator and Field Investigator which must be imputed to him, constitute arbitrary and capricious conduct and abuse of his powers? Did the Comptroller arbitrarily ignore the anti-competitive effect of granting an affiliate bank charter to the largest bank in Laredo?

At the time of the approving of the respondents' application by the Comptroller there were four banking facilities in Laredo. The Laredo National Bank of Laredo and its branch facility at the Laredo Air Force Base, Union National Bank of Laredo and Petitioner, Bank of Commerce of Laredo. Laredo National Bank with deposits in excess of 139 million dollars, owns over 60% of the total banking assets in the community. It has interlocking directorate with Laredo Savings and Loan Association, which owns over 70% of



the total savings and loan assets of Laredo. Laredo National Bank and Union National Bank of Laredo are located in the downtown business area, which generates more than 60% of the total annual income in the City of Laredo. Bank of Commerce of Laredo, Petitioner, is located off the last exit of the Expressway, immediately north of the Tex-Mex Railway tracks on the northern outskirts of the downtown business area.

The location of theproposed new bank is two miles north of Bank of Commerce of Laredo. The farthest residential development in the proposed primary service area is 4 1/2 miles north of Bank of Commerce of Laredo. The downtown banks are in fact faced with a problem of traffic congestion and inadequate parking space. This is not true of Bank of Commerce of Laredo, which is free of traffic congestion from any point within the primary service area, has more than adequate

parking space, and is within 5 to 6 minutes driving time from the farthest point within the service area; only two minutes from the proposed location, and only one minute from the southern boundary of the proposed service area along the Expressway.

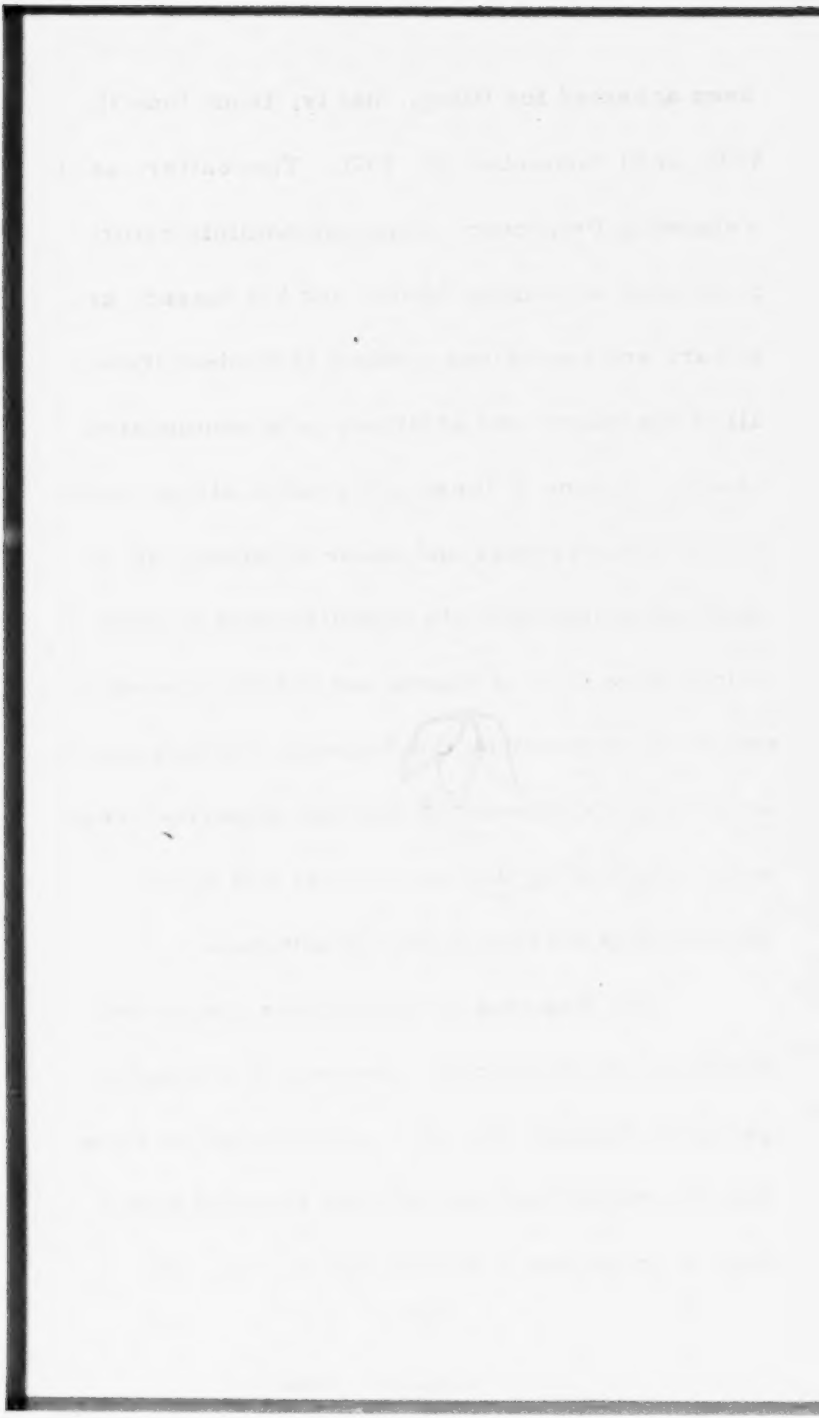
The Laredo Air Force Base is closer to Bank of Commerce of Laredo than to the proposed new bank. Its payroll comprised about 21% of the total annual income of Laredo, the downtown business area about 60%, and the proposed service area, at best, some 8% of the total annual income. None of the residential areas within the service area, which may be considered a source of potential bank customers, are more than two miles or 2 1/2 minutes driving time farther from Bank of Commerce of Laredo than from the proposed location. (NOTE: The Laredo Air Force Base was ordered closed as of

September 1st, 1973).

Two inter-office memos, dated June 15 and September 22, 1971, reflect that proponents had several ex-parte meetings with the Regional Administrator. Petitioner does not question the authority of the Comptroller to hold ex-parte meetings in pursuance of its investigative and fact finding function after an application has been accepted for filing. But the wording of the memos and unusual number of ex-parte meetings prior to the filing of the application leave a strong, if not obvious, implication that the Regional Administrator rendered such unusual assistance in the structuring and preparation of the application as to infer a biased predetermined approval of the application, making a sham of any subsequent proceedings. The Regional Administrator did not display haste until after the application had

been accepted for filing, that is, from June 15, 1971, until November 26, 1971. Thereafter, as it related to Petitioner, Regional Administrator proceeded with undue haste, and his biased, arbitrary and capricious conduct is evident from all of his biased and arbitrary acts enumerated herein. If none of these acts, taken alone, constituted arbitrariness and abuse of power, all of them taken together, do establish such a clear prima facie case of biased and arbitrary conduct and abuse of power by the Regional Administrator, as to deny Petitioner the fair and impartial treatment required by the due process and equal protection provision of the Constitution.

The Regional Administrator instructed his field investigator to commence his investigation on January 24, 1972, even though he knew that Petitioner had not yet been supplied with a copy of proponent's economical survey. An



examination of the field investigator's report clearly reflects that almost all economic and other data was copied verbatim, almost without exception, from proponent's economic survey. The field investigator adopted such flagrant, false premises and omissions of crucial information as to intentionally, or otherwise, deny the staff of the Comptroller in Washington, D. C., a correct basis upon which to make a proper determination. These biased, arbitrary acts by the field investigator are enumerated herein and constitute prima facie evidence of arbitrariness and abuse of power, which must be imputed to the Comptroller. The Administrative File clearly reveals all of these alleged arbitrary acts on the part of the field investigator.

While the Comptroller may have not personally committed these arbitrary acts and abuses of power, the acts of his subordinates

are his responsibility and are imputable to him.

As it respects the Comptroller personally, Petitioner submits that he acted arbitrarily and abused his powers in ignoring the anti-competitive effect which will result from the granting of an affiliate bank charter to the largest bank in the relevant marker, i.e., the City of Laredo, if, indeed, the anti-trust statutes do not protect an existing small bank against the Comptroller giving the largest bank an undue competitive advantage over its smaller competitors, he is nonetheless under a duty not to contribute to an anti-competitive trend which will be highly detrimental to the smaller competitors, simply to avoid the relative inconvenience to a substantially few potential customers within the primary service area of having to drive not more than two miles or more than 2 1/2 minutes to an already existing bank which is free of traffic congestion, has three

drive-in windows, and more than adequate parking space.

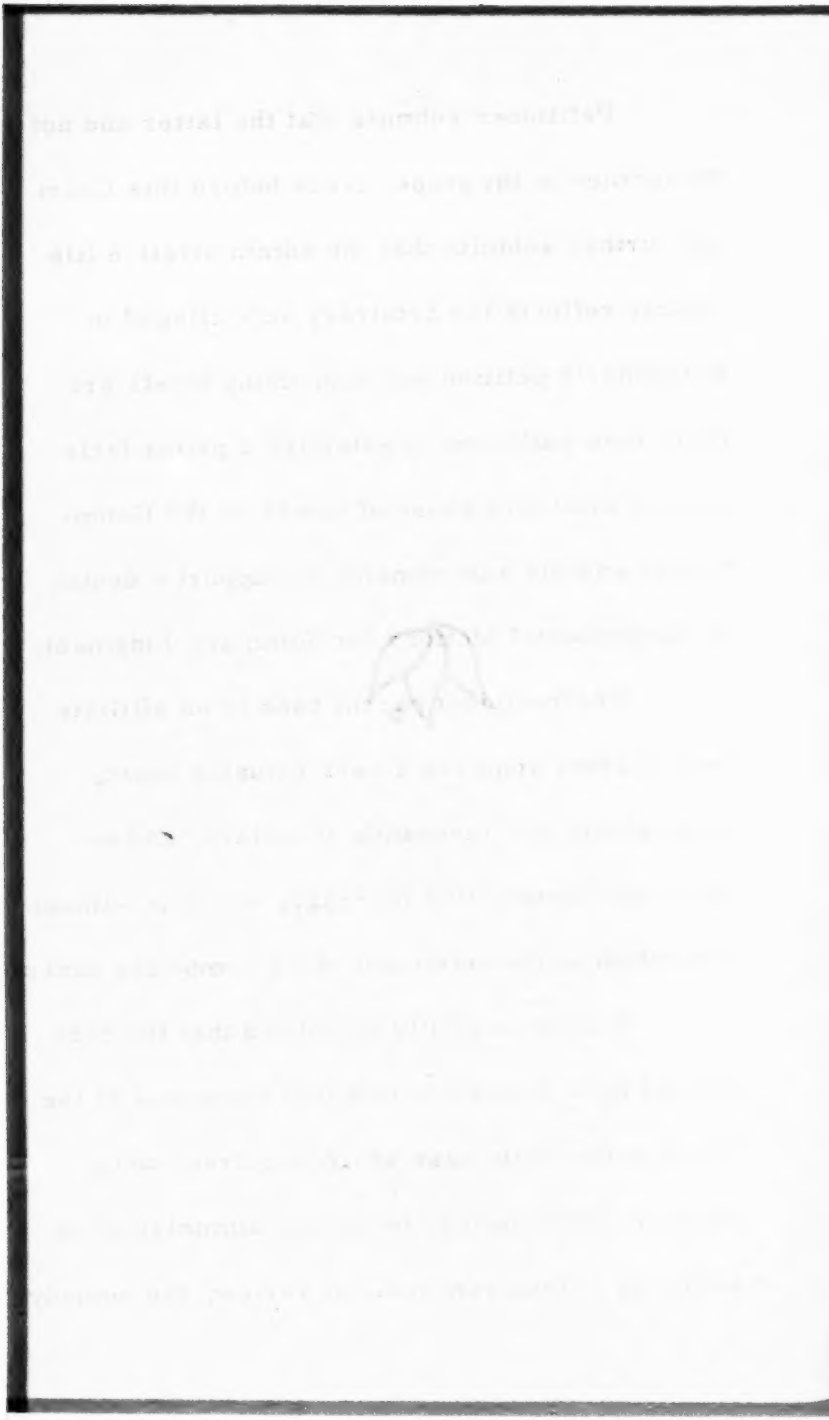
Public need and convenience must be taken in their proper context. True, a bank at every corner is obviously convenient to every resident, but the true context of these terms is the relative need and convenience to the public in light of existing, readily available banking facilities located within 5 1/2 miles from the farthest point in the primary service area.

The question is not whether the Comptroller would have arrived at the same decision even if the alleged arbitrary and capricious acts of the Regional Administrator and the Field Investigator had not been committed, but, rather, whether Petitioner was accorded fair and impartial treatment free of biased and arbitrary conduct on the part of the Comptroller and his subordinates.

Petitioner submits that the latter and not the former is the proper issue before this Court and further submits that the administrative file clearly reflects the arbitrary acts alleged in Petitioner's petition and supporting briefs are more than sufficient to establish a prima facie case of arbitrary abuse of power by the Comptroller and his subordinates to support a denial of Respondents' Motions for Summary Judgment.

The recipient parent bank of an affiliate bank charter acquires a very valuable asset, translatable into thousands of dollars, and an additional competitive leverage, which is without a question to the detriment of its competing banks.

It is respectfully submitted that the case at hand falls directly within that statement of the Court in the Pitts case which requires, when there is such a failure to explain administrative action as to frustrate judicial review, the remedy



is to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency's decision as may prove necessary. Unlike the Pitts case, but like the Overton case, in the present case there was absolutely no explanation whatsoever. The charter was granted without a location for the proposed bank being known. The economic survey was based on false and misleading information. Thirty-seven acts of misconduct are apparent from the administrative file. It is felt that all of these acts need clarification and this clarification can be had only with the use of discovery processes. That this is not the only case in which the acts of the former Comptroller, Camp, are questioned is quite apparent from a number of cases filed against him all over the United States. While the language used by Federal Judge Charles R. Richey, may not be exactly applicable to this

procedure, the Petitioner respectfully contends that it may not be completely inapplicable. In the case of Wood County Bank vs Camp, No. 127772 on the docket of the United States District Court for the District of Columbia, Judge Richey in commenting on the procedure followed by the Comptroller which ended with a Federal Charter stated, "It stinks to high heaven." During an additional hearing on the matter held on or about Friday, February 16, 1973, the Court again said,"I think it smells. I thought it when I heard this case first. It still stinks to high heaven." He further stated, "That is one of the reasons why the public in the United States is losing confidence in its government."

SUMMARY

The Petitioner states that this entire file, including the Comptroller's Administrative File, the transcript of the proceedings of the hearing before the Regional Administrator, and the pleadings on file herein show conclusively that the Comptroller's decision was arbitrary, capricious and otherwise not in accordance with law, or, at the very least, that the Petitioner has made a prima facie case of an abuse of discretion.

The refusal of the Comptroller to explain his decision--indeed his arbitrary failure to send to the Petitioner a copy of his conditional approval instead of a mere letter stating the application had been approved--- enhance the likelihood that misconduct did occur.

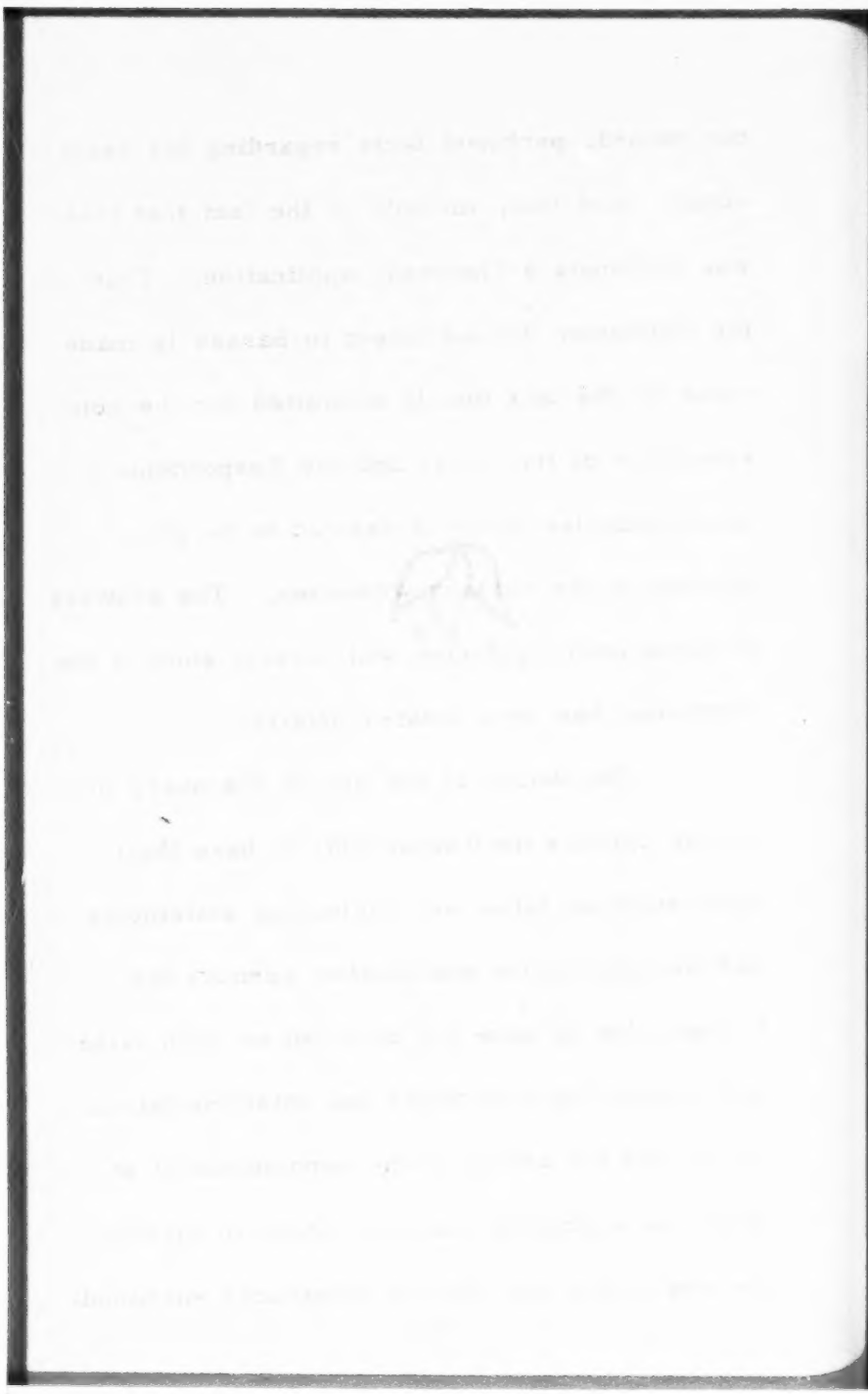
The acts of the Comptroller, his

employees, agents and representatives require the closest scrutiny.

The cases heretofore decided by the Courts of these United States show that the Comptroller has always felt that the official files were his own personal property, his conduct not subject to any review whatsoever and that his decisions were above the law of this country. Gradually, the courts have in no uncertain terms made it clear that the acts and the decisions of the Comptroller are subject to review and that his files are public property to be seen by reviewing courts under appropriate circumstances. The Comptroller has contested every effort of the people of the United States to make him responsible to the people and subject to the laws of this country. Here, again, he is contesting the right of competition to ascertain under oath, and for

the record, pertinent facts regarding his decisions. And this, in spite of the fact that this was obviously a "favored" application. That the Petitioner did not intent to harass is made clear by the fact that it submitted for the consideration of the Court and the Respondents interrogatories which it desired to be propounded to the various witnesses. The answers to these interrogatories will clearly show if the Petitioner has been treated unfairly.

The denial of the use of discovery processes permits the Respondents to base their application on false and misleading statements and misinformation and further permits the Comptroller to base his decision on such false and misleading statements and misinformation. To permit the taking of the depositions of at least the applicants can only serve to clarify the application and the circumstances surround-



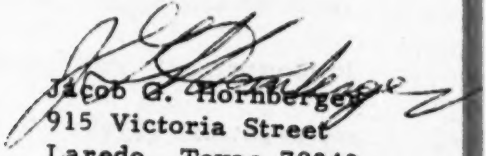
ing its approval. No harm whatsoever can be done to either party by the use of discovery processes, and it is respectfully represented that the denial by the district court of the Petitioner's right to the use of such processes and the denial of its right to have the Comptroller explain his decision is a denial of due process under the Constitution of the United States. At the risk of being repetitious, and in the words of Justice Douglas, every effort must be made by the Courts and by the people of this country to keep the Comptroller and other federal agencies from "being a free-wheeling agency dispensing federal favors".

Pitts vs Camp, supra, sets out an orderly procedure to be followed in cases of this type, and since the decision of the Supreme Court was rendered after Petitioner's pleadings were filed, and since that decision clarifys

many of the points previously listed, Petitioner's prayer for relief is along the lines of the Pitts decision rather than that originally requested in its pleadings.

WHEREFORE, petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,



Jacob G. Hornberger
915 Victoria Street
Laredo, Texas 78040
Tel. AC 512 722-1121

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of January, 1974, a copy of Petitioner's Petition for a Writ of Certiorari was by me mailed to Hall & Zaffirini, 511 Sames-Moore Building, Laredo, Texas, 78040, Mann, Castillon, Freed & Kazen, P.O. Box 820, Laredo, Texas 78040, The Honorable Anthony J.P. Farris, United States Attorney, P.O. Box 61129, Houston, Texas 77061 and Mr. Ronald R. Glancz, Attorney, Appellate Section, Civil Division, Room 3643, U.S. Department of Justice, Washington, D.C. 20530, attorneys for Defendants-Respondents.

J. G. Hornberger

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH COURT

NO. 73-2217
Summary Calendar

BANK OF COMMERCE OF LAREDO
Plaintiff-Appellant,

versus

CITY NATIONAL BANK OF LAREDO, ET AL,
Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Texas

(September 13, 1973)

Before WISDOM, AINSWORTH and CLARK,
Circuit Judges.

CLARK, Circuit Judge: The Bank of Commerce of Laredo appeals from the district court's refusal to set aside the grant of a national bank charter by the Comptroller of the

Currency of the United States to the City National Bank of Laredo. The Bank of Commerce contends that the trial court erred in denying it access to the discovery process, in refusing to order the Comptroller to explain the reasons for his approval of the charter application, and in granting defendant's motion for summary judgement. We affirm.

City National was organized as an affiliate of the Laredo National Bank, a competitor of the Bank of Commerce, which vigorously opposed the application from the beginning. Pursuant to City National's application, a national bank examiner from the Comptroller's office conducted a field investigation of the proposed new bank, its management and organizers, gathered and confirmed statistical data, talked to personnel from the various competitor banks, and

interviewed businessmen in the proposed service area. Subsequently, he tendered written findings, including a comprehensive economic profile of the service area and its prospects, and recommended that the application be approved. At appellant's request, the Regional Comptroller of the Currency held a public hearing on the application, and following an examination of additional economic reports and other information proffered by the interested parties, he like wise recommended approval, furnishing written reasons for his action. Thereafter, the Comptroller and his staff reviewed the entire record and ultimately granted City National a certificate of authority to commence banking.

After these efforts in the administrative proceedings had proved unavailing, Bank of Commerce turned to the court below seeking a

declaratory judgment that the Comptroller's approval of the charter application was unlawful, an injunction prohibiting City National and its organizers from participating in the banking business pursuant to the charter, and a trial de novo on the merits of City National's charter application. From fourteen grounds of unlawfulness alleged in plaintiff's wide ranging complaint, the district court distilled three bases for the allegation that the Comptroller's action was arbitrary and capricious: (1) the procedure employed by the Comptroller was illegal; (2) his approval of the charter application circumbented the Texas prohibition against branch banking; and (3) the grant of a bank charter to City National violated the antitrust laws of the United States. After dismissing the complaint against Laredo National Bank and its executive officers, who had participated in the organiza-

tion of City National, and against Michael Doman, The Regional Administrator of National Banks, for failure to state a claim upon which relief could be granted, that court denied appellant's request for a trial de novo and granted summary judgment for the remaining defendants, City National Bank, its organizers, and William B. Camp, Comptroller of the Currency. Neither ground (2) or (3) is urged by the Bank of Commerce on this appeal.

The Bank of Commerce alleges 37 specific arbitrary and capricious acts by the Comptroller and his staff. Furthermore, appellant complains that the trial court wrongfully denied its motion to depose and serve interrogatories on the Comptroller, several members of his staff, the organizers of City National, and the officers of Laredo National Bank who testified

in favor of City National's application. Finally, in an attempt to tailor its appeal so as to invoke the relief ordered in Camp v. Pitts, _____ U. S. ____, 93 S. Ct. 1241, ___ L. Ed. 2d ___ (1973), the Bank of Commerce contends that the Comptroller so failed to explain his decision as to frustrate effective judicial review.

In Bank of Dearborn v. Saxon, 244 F. Supp. 394 (E. D. Mich. 1965), aff'd sub nom. Bank of Dearborn v. Manufacturers National Bank of Detroit, 377 F. 2d 496 (6th Cir. 1967), the Comptroller approved the defendant bank's new charter application, which when coupled with the relocation of another established bank, permitted the defendant by sleight of hand to circumvent a Michigan statute regulating branch banking. Finding a prima facie case of sham and subterfuge, the district court overturned the

Comptroller's approval of the application as an abuse of discretion and forced disclosure of the administrative file, denying a claim of privilege advanced by the Secretary of the Treasury. In Camp v. Pitts, supra, the Comptroller denied plaintiff's bank charter application with only a very cursory explanation. The Supreme Court held that if "there was such failure to explain administrative action as to frustrate effective judicial review, the remedy was not to hold a (trial) de novo .... but ... to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary." 93 S. Ct. at 1244. The Bank of Commerce asks this court to reverse and remand with instructions that the district court elicit further commentary from the Comptroller explaining his

decision and accord appellant access to the discovery process.

Appellant's reliance on these decisions, however, is misconceived.

The preponderant weight of judicial precedent bars plaintiffs from deposing the Comptroller or requiring him to answer interrogatories. U. S. v. Morgan, 313 U. S. 409, 422, 61, S. Ct. 999, 1004-05, 85 L. Ed. 1429 (1941); Warren Bank v. Saxon, 263 F. Supp. 34 (E. D. Mich. 1966), aff'd sub non. Warren Bank v. Camp, 396 F. 2d 52, 56 (6th Cir. 1968); Klanke v. Camp. 320 F. Supp. 1185 (S. D. Texas 1970). The Supreme Court recently affirmed this policy in Camp v. Pitts, supra, stating that 'the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."

restricted the use of ex parte methods to obtain information from the banks and parties involved, even if such methods are utilized after a hearing has taken place. First National Bank of Fairbanks v. Camp, 465 F. 2d 486, 603-04 (D.C. Cir. 1972), cert. denied, _____ U.S. _____, _____ S. Ct. _____, L. Ed. 2d _____ (1973); Sterling National Bank of Davie v. Camp, 431 F. 2d 514, 516 (5th Cir. 1970), cert, denied, 401 U. S. 925, S. Ct. 879, 27 L. Ed. 2d 829 (1971); Ramapo Bank v. Camp, 425 F. 2d 333, 347-8 (3d Cir.), cert. denied, 400 U. S. 828, 91 S. Ct. 67 L. Ed. 2d 58 (1970); Citizens Bank of Hattiesburg v. Camp, 387 F. 2d 375 (5th Cir. 1967), Cert. denied, 391 U. S. 904, 88 S. Ct. 1652, 20 L. Ed. 2d 418 (1968). Here, the Bank of Commerce was afforded the opportunity of a public, albeit nonadversary, hearing in which to register its protest. The administrative file was left open

for exparte submissions by anyone so interested for five days thereafter. Furthermore, the refusal to grant a continuance was well within the ambit of the Comptroller's discretion. Viewed in their overall context, these assertions simply do not warrant the conclusion that the procedure before the Comptroller was a sham and subterfuge. Thus, we accept the observation of the district judge that " the real crux of the matter is simply that (the Bank of Commerce) disagrees with the Comptroller's finding; .... (appellant) seeks to persuade this court that it, rather than the Comptroller, has the right answers."

Similarly, in Warren Bank v. Saxon, supra, the same district court strictly limited application of its prior decision in Bank of Dear-Born v. Saxon, supra, which the Bank of Com-

merce cites as controlling.

The case, then does not go to the extreme argued for it by plaintiff. What the plaintiff is actually arguing, with respect to deposing the Comptroller, is that if a plaintiff merely alleges the Comptroller to be arbitrary, he can thereupon question him to see whether or not he really is arbitrary, despite a showing in the administrative file of the exercise of a careful and conscientious discretion. There is no precedent for such a course of action, it is not warranted in the statutes, and it would be utterly destructive of the manifested Congressional intent to vest a broad discretion to the expertise of an administrative official in this sensitive and complex area of banking. Plaintiff has the cart before the horse. Plaintiff wants to depose the Comptroller to expose wrongdoing. The law

is the other way around. If Plaintiff can show wrongdoing (not in the sense of proving it, but merely showing circumstances that to a reasonable view would indicate sham, subterfuge or similar wrong) he may then depose the Comptroller as required.

263 F. Supp. at 39.

A punctilious review of the administrative record, which of course is the same as was before the court below, also fails to indicate any such paucity of administrative explanation as would frustrate effective judicial review of the Comptroller's action. The district court correctly deferred to the Comptroller's expertise where the administrative record adequately explained and justified his decision to grant a national bank charter. See First National Bank of Southaven v. Camp, 471 F. 2d 1322, 1326-27 (5th Cir. 1973). Here that voluminous record surely

indicated the determinative reason for the final agency action: a finding that the new bank was soundly organized, capitalized and managed and constituted a sound economic venture in light of the banking needs and services already available in the surrounding community. When findings of fact, rendered contemporaneously with the concomitant administrative decision, are subsequently available, a reviewing court may not require the agency officials who participated in that decision to give testimony explaining their action unless there has been a strong showing of bad faith or improper behavior. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U. S. 402, 420, 91 S.Ct. 814, 825, 28 L. Ed. 2d 136 (1971). As stated by the Court in Camp v. Pitts, supra, also relied on by appellant:

The validity of the Comptroller's action must, therefore, stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideration. It is in this context that the court of Appeals should determine whether and to what extent, in the light of the administrative record, further explanation is necessary to a proper assessment of the agency's decision. (citation omitted) 93 S. Ct. at 1244.

The appellant's assertions of misconduct and collusion are wholly refuted by the record.

Lastly, the Bank of Commerce contends that the Comptroller abused his discretion in approving City National's charter application

and that this charge was inappropriate for summary disposition by the court below. When reviewing a case disposed of under Fed. R. Civ. P. 56, an appellate court must apply the same general standard as that initially employed by the trial court--whether there is any genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. 10 C. Wright & A. Miller, Federal Practice and Procedure § 2716, at 430 (1973). Moreover, when a plaintiff who has no right to a trial de novo brings an action to review an administrative record which is before the reviewing court, "the case is ripe for summary disposition, for whether the order is supported by sufficient evidence, under the applicable statutory standard, or is otherwise legally assailable, involve matters of law." 6 J. Moore, Federal Practice

¶ 56.17 (3), at 2472 (1965). The appropriate legal standard for conducting such review is that established by the legislation authorizing the agency action and the appurtenant provisions of the Administrative Procedure Act.

The National Banking Act, 12 U. S. C. § 21 et seq. (1970), which authorizes the Comptroller to grant new certificates of authority to commence banking, accords him broad discretion to approve or reject new charter applications. See 12 U. S. C. § 26, 27 (1970). Since neither the National Banking Act nor the Administrative Procedure Act, 5 U. S. C. § 701-06 (1970), requires the Comptroller to conduct a hearing or make formal findings when passing upon new bank charter applications, 5 U. S. C. § 557 (1970); 12 U. S. C. § § 26, 27 (1970), the appropriate standard for judicial review is not

the "substantial evidence" test, which applies when findings made on a hearing record are to be reviewed, 5 U. S. C. § 706 (2) (E) (1970); rather, the inquiry is whether the Comptroller's adjudication was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. § 706 (2) (A); Camp v. Pitts, supra; Sterling National Bank of Davie v. Camp, supra; Citizens Bank of Hattiesburg v. Camp, supra. See Investment Company Institute v. Camp, 401 U. S. 617, 626, 91 S. Ct. 1091, 1097, 28 L. Ed. 2d 367 (1971). After reviewing the Comptroller's administrative file and appellant's pleadings and briefs the district court applied the required test in haec verba, finding " that the Comptroller's decision was not arbitrary, capricious, or otherwise not in accordance with law." Our inde-

pendent review of the entire record on appeal, including the administrative file and other exhibits, confirms that this decision was clearly correct.

Since the record provided a substantial basis for the agency action and foreclosed the existence of any material fact issues, the entry of summary judgment dispositions are the form commonly employed in reviews of similar Comptroller action. See Camp v. Pitts, supra; First National Bank of Southaven V. Camp, supra; First National Bank of Crown Point v. Camp, 463 F. 2d 595 (7th Cir. 1972); Sterling National Bank of Davie v. Camp, supra; Warren Bank v. Camp, supra; Warren Bank v. Camp, supra.

The decision of the district court is

AFFIRMED.

A true copy

Test: EDWARD W. WADWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit

By /s/ Maryette Farley
Deputy

NOV 2 1973

New Orleans, Louisiana

U. S. Court of Appeals
FILED
OCTOBER 25, 1973
Edward W. Wadsworth,
Clerk

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-2217
Summary Calendar

BANK OF COMMERCE OF LAREDO,
Plaintiff - Appellant,

versus

CITY NATIONAL BANK OF LAREDO, ET AL,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

On Petition for Rehearing
(October 25, 1973)

Before WISDOM, AINSWORTH AND CLARK,
Circuit Judges.

Per Curiam:

It is ordered that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ON PETITION FOR REHEARING

(OCTOBER 25, 1973)

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

MEMORANDUM AND ORDER

(Number and Title Omitted)

Filed April 25, 1973

Plaintiff Bank of Commerce of Laredo seeks a declaratory judgment that the approval by the Comptroller of the Currency (hereafter "Comptroller") of an application for a national bank charter for City National Bank of Laredo was unlawful. It also seeks an injunction prohibiting City National and its organizers from carrying on banking business pursuant to the approval of the said charter application. Plaintiffs also prayed for a trial de novo in this Court on the merits of City National's charter application. Named as Defendants are City National Bank and its organizers, Hall, Sanchez, Magnon, Guerra, and Zuniga; Michael Doman, individually and as Regional Administrator of National Banks; William B. Camp, Individually and as

Comptroller of the Currency of the United States; Laredo National Bank; Max Mandel and Gary Jacobs, executive officers of Laredo National Bank.

As to Laredo National Bank, Mandel, and Jacobs, Plaintiff's complaint complains of their participation in the organization of City National Bank; however, the complaint fails to state a claim for which relief can be granted against those Defendants, and indeed seeks no relief against them. Therefore, Plaintiff's complaint is hereby dismissed as to Defendants Laredo National Bank, Max Mandel and Gary Jacobs.

The Defendant Doman is a subordinate employee of the Comptroller, who has no authority to grant or deny bank charter applications. Although he did conduct the hearing on the application, the final decision was not his.

Plaintiff's complaint fails to state a claim for which relief can be granted against Doman; therefore, the complaint is hereby dismissed as to Defendant Michael Doman, Individually and as Regional Administrator of National Banks.

Plaintiff's request for a trial de novo must be denied. In Camp v Pitts, No. 72-864, the Supreme Court, in an opinion dated March 26, 1973, enunciated clearly the standard for judicial review of the Comptroller's decision as to bank charters, stating on pages 4-5,

"The appropriate standard for review was accordingly, whether the Comptroller's adjudication was 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law' as specified in 5 U. S. C., Sec. 706 (2) (A). In applying that standard, thefocal point for judicial review should be the administrative record already in existence, not some new record made

initially in the reviewing court."

and so specifically rejected the idea of a trial de novo before a District Court. The substantial evidence test was also rejected as being inappropriate in cases such as the one before this Court.

Plaintiff alleged fourteen "grounds of unlawfulness" of the decision, but several of them are mere conclusions. It appears to the Court that Plaintiff has actually alleged three bases for its conclusion that the decision was "arbitrary, capricious, and otherwise not in accordance with law." First, Plaintiff contends the procedure followed by the Comptroller was illegal. Second, Plaintiff contends the approval of the application contravenes the Texas prohibition of branch banking. Third, Plaintiff contends the approval was in violation of the anti-trust laws of the United States and Texas. The remaining Defendants have filed their respective

motion for summary judgment.

Plaintiff contends the entire procedure was a sham and subterfuge. It objects to the ex parte meetings between the Comptroller's staff and City National's organizers, and says it did not have an adequate opportunity to oppose the granting of the charter, and hints at collusion. The answer to these complaints is clear. Section 27 of Title 12 of the United States Code gives the Comptroller the authority to approve applications. The Fifth Circuit, in Sterling National Bank v. Camp, 431 F. 2d 514 (1971), has rejected the necessity of an adversary hearing, and makes it clear that, even after a hearing, obtaining information from the banks involved, ex parte, is not improper. Such further investigation does not constitute collusion so as to warrant this Court in finding the Comptroller's approval is arbitray or capricious. Rompu

Bank v. Camp, 425 F. 2d 333 (3rd Cir. 1970),

Plaintiff is also unhappy because the hearing officer refused to grant a continuance. In view of the fact that a hearing is not required, the refusal to grant a continuance, for whatever reason, while perhaps annoying, does not seem legally objectionable. It is also relevant to note at this point, that following the hearing, the public file was kept open for several days. It was open for anyone to examine and add to. It appears to this Court a full investigation was made and that the real crux of the matter is simply that plaintiff disagrees with the Comptroller's findings; and Plaintiff seeks to persuade this Court that it, rather than the Comptroller, has the right answers. The Court is not to substitute its opinion of the merits for that of the Comptroller's. Citizens Bank of Hattiesburg v. Camp,

387 F. 2d 375 (5th Cir. 1967), cert. den. 391 U. S. 904 (1968).

Plaintiff contends that the admitted affiliation of City National Bank with the existing Laredo National Bank creates a violation of the Texas prohibition of branch banking. This position is without merit. A Texas court has said that the mere fact that stockholders of one bank were also the majority stockholders of a new bank does not require the conclusion that the new bank is in reality just a branch of the existing bank. Bank of North America v. State Banking Board, 468 S. W. 2d 529 (Civ. App. 1971), no writ history. In Camden Trust Co. v. Gidney, 301 F. 2d 521 (D. C. Cir. 1962), cert. den. 369 U. S. 886 (1962), the Court held that the Comptroller was authorized to issue a certificate of authority to a national Bank to commence business, where the new bank was an affiliate of an

existing bank, and issuance of such charter was not pr
cluded on the theory that the new affiliate bank
was a branch bank not authorized by state and
federal law. We quote with approval the follow-
ing statement from the Court's opinion:

"It is not within our province to pass upon the desirability vel non of permitting a national bank to have an 'affiliate,' as the appellant has here used the term. If such an affiliate is to be denied status, Congress must clearly say so. It is sufficient for our disposition of the present controversy to observe that what was done was within the authority conferred by existing statutes." Camden Trust Co. v. Gidney, supra, p. 525.

Plaintiff also contends the Comptroller's decision was not in accordance with law because it contra-
venes the antitrust laws of the United States, 15 U. S. C., Sec. 1, et seq. Plaintiff alleges the

result tends to restrain competition in the banking business, since one group of named persons would then have a substantial interest in three Laredo financial institutions. Plaintiff's argument fails to convince us for two reasons. To begin with, 12 U. S. C., Sec. 27, does not state that the Comptroller is to look to other United States laws in considering charter applications, while the Bank Merger Act specifically directs the Comptroller to consider the antitrust laws in making his decision as to a merger. The fact that Congress directed the Comptroller to look to the antitrust laws in one instance, but not in the other, indicates that the Comptroller is not required to consider the antitrust laws when approving bank charter applications. The Court in National Bank of McKeesport v. Saxon, 268 F. Supp. 720 (W. D. Pa. 1967), was confronted with a contention similar to the one advanced by this

Plaintiff. That Court stated,

".... if the Plaintiffs are attempting to plead a private antitrust cause of action, the pleading is defective because the Comptroller of the Currency is improperly joined as a party-defendant. Nowhere in the statute or case law do we find any authority for bringing an antitrust action against a Federal Agency. If the plaintiffs wish to pursue a private antitrust action against the (City National Bank) they should do so in a separate action against that defendant alone." (p. 724)

The Comptroller's action was not "not in accordance with law" because of a failure to consider the antitrust laws.

Upon reviewing the administrative file and Plaintiff's pleadings and briefs, the Court concludes that the Comptroller's decision was not arbitrary, capricious, or otherwise not in

accordance with law. For this reason, the several motions for summary judgment filed by the respective Defendants must be, and hereby are, granted. Counsel for the Defendants shall prepare a form of final judgment in accordance with the foregoing Memorandum and Order, and present same to the Court within fifteen (15) days from this date. The Clerk shall furnish the appropriate counsel with copies hereof.

Signed this 24th day of April, 1973.

/s/ OWEN D. COX

UNITED STATES DISTRICT JUDGE

FINAL JUDGMENT

(Number and Title Omitted)

Filed: May 16, 1973

The Court, having heard the respective Motions for Summary Judgment, or in the alternative for Judgment on the Pleadings of William B. Camp and Michael Doman, individually and in their official capacities, and the similar motions of the private defendants, the City National Bank of Laredo, Horace C. Hall, III, Ramiro Sanchez, Alberto H. Magnon, Jr., Armengol Guerra, Jr., Carlos A. Zuniga, Max A. Mandel, Gary G. Jacobs, and the plaintiff's opposition thereto, and finding, on the basis set out in the Memorandum and Order filed herein on April 25, 1973, that the motions of such defendants should be granted, it is accordingly

ORDERED, ADJUDGED AND DECREED that the Bank of Commerce of Laredo shall have

and take nothing against the above-named defendants; that this Civil Action and the same is hereby

DISMISSED WITH PREJUDICE; and that the costs of these proceedings are hereby adjudged against the plaintiff, Bank of Commerce of Laredo.

DONE at Corpus Christi, Texas, this 15th day of May, 1973.

/s/ OWEN D. COX

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ HORACE C. HALL III
HORACE C. HALL, III
Sames-Moore Building
Laredo, Texas 78040

/s/ GEORGE KAZEN
GEORGE KAZEN
Mann, Castillon, Freed & Kazen
P.O. Box 820
Laredo, Texas 78040

/s/ J. G. HORNBERGER
J. G. HORNBERGER
915 Victoria Street
Laredo, Texas 78040

ANTHONY J. P. FARRIS
United States Attorney

By: /s/ WILLIAM L. BOWERS, JR.
WILLIAM L. BOWERS, JR.
Assistant United States Attorney

May 23, 1972

Mr. Horace C. Hall, III

Post Office Box 207

Laredo, Texas

Dear Mr. Hall:

We are pleased to inform you that the Comptroller of the Currency has granted preliminary approval of the application submitted by you and your associates to organize a National Bank as follows:

Title:	"City National Bank of Laredo"
Location:	4500 San Bernardo Avenue, Laredo, Texas
Capital Authorized -	$ 345,000
Shares of Stock -	34,500
Capital Issued -	$ 300,000
Issued -	30,000
Surplus -	$ 150,000
Par Value -	$ 10.00

Undivided Profits	-	$ 150,000
Sale Price	-	$ 20.00

In addition to the aforementioned, this approval is granted subject to the following conditions:

1. That executive management acceptable to this office will be provided.

2. It is understood that 51% of the stock of the new bank will be offered to shareholders of the Laredo National Bank on a pro-rata share-for-share basis and no one individual or his interests holding in excess of 5%.

3. Any individual or his interest who will hold 5% of the stock will file Financial and Biographical Reports.

4. It should be understood that subscription funds collected during the organization of the bank may only be invested in United States Govern-

ment Securities.

5. That the use of free service charge accounts at the opening of the bank will not be permitted without the prior approval of this office.

6. If a buy or sell agreement is contemplated between the directors or incorporators, the proposed agreement should be forwarded to this office for review.

7. That all organization expenses in connection with the organization of the bank will not be capitalized, but will be charged directly to the Undivided Profits Account of the bank on the General Ledger on the date the bank opens for business.

8. That the bank's books will be maintained on an accrual method acceptable to this office.

9. That legal fees in connection with the

organization of the bank will not exceed a maximum of $5,000. In addition, a complete log must be kept showing the date, hours worked, nature of the work and fee charged.

10. An offering Circular in connection with the issuance of the capital stock must be filed.

11. Stock certificates shall not be issued prior to the date the bank opens for business, it being understood that all stock will be issued immediately following the opening of the bank.

12. In addition to regular coverage, the bank will have in force $1,000,000 excess Fidelity Bond the date it opens for business. This should be reflected in the minutes of the meeting at which regular coverage is purchased.

13. Land and building will be owned by the bank and the investment in fixed assets should not exceed $240,000.

14. Correspondent bank balance of the

new bank should not be used to support borrowings of the organizers and proposed directors in connection with the stock acquisition of the new bank.

15. That the active senior executive officer will serve as a member of the Board of Directors.

16. Within one year from the date the bank opens for business any new director or officer must file Financial and Biographical Reports with the Regional Administrator prior to assuming the responsibilities of the position.

Directors: At the organization meeting of the incorporators, the following names should be submitted for election as interim directors:

Armengol Guerra, Jr.

Horace C. Hall III

Alberto H. Magnon, Jr.

Ramiro Sanchez

Carlos A. Zuniga

Officers:

Alberto H. Magnon, Jr. -President-

$16,000 per annum

Ramiro Sanchez-Chairman of the Board-

no remuneration

Financial and Biographical Reports of any officers or additional directors should be forwarded to Regional Administrator of National Banks, Michael Doman.

Banking Quarters: Please submit data with respect to a definite location, with information as to the terms and cost of the investment in or lease of bank premises and the estimated cost of furniture, fixtures and equipment at this site to this office.

The "Comptroller's Manual for National Banks" will be mailed to you under separate

cover.

Forms and instructions to be used in the organization procedure are enclosed. We invite your attention to Page 1, Paragraph 3 of the Instructions wherein the first phase of the organization should be completed within fifteen days.

Your attention is invited to the enclosed, Banking Circular No. 31, dates October 22, 1970. This circular should be presented at the meeting of the Interim Board and each director should be apprised of the contents of the circular.

We assure you that we shall be pleased to have you communicate with us at any time we can be of help to you and your associates in completing the organizational plan.

Very truly yours,

(Signed, Thomas G. DeShazo)
Thomas G. DeShazo

Deputy Comptroller of the
Currency

Enclosures

jab

TITLE 12 U. S. C. SECTION 21

Section 21. Formation of national banking associations - Incorporators - Articles of association - Associations for carrying on the business of banking under this Title may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office. (R. S. § 5133)

TITLE 12 U. S. C. SECTION 26

Comptroller to determine if associations can commence business. - Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this Title, and the association transmitting the same notifies the Comptroller that all of its capital stock has been duly paid in, and that such association has complied with all the provisions of this Title required to be complied with before an association shall be authorized to commence the business of banking, the Comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with

all the provisions of this title required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the Comptroller to determine whether the association is lawfully entitled to commence the business of banking. (R. S. § 5168; Sept. 8, 1959, P. L. 86-230, § 2, 73 Stat. 457.)

TITLE 12 U. S. C. SECTION 27

Certificate of authority to commence banking. -If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the Comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is law-

fully entitled to commence the business of banking, the Comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the Comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this Title. (R. S. § 5169.)

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Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

BANK OF COMMERCE OF LAREDO, PETITIONER

v.

CITY NATIONAL BANK OF LAREDO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT COMPTROLLER OF THE CURRENCY IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

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BANK OF COMMERCE OF LAREDO, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT COMPTROLLER OF THE CURRENCY IN OPPOSITION

Petitioner seeks review of a decision of the United States Court of Appeals for the Fifth Circuit (Pet. App. A 1-20) affirming the decision of the district court (Pet. App. C 23-33) which upheld the granting of a new national bank charter by the Comptroller of the Currency of the United States to the City Bank of Laredo.

In its comprehensive and well-reasoned opinion, upon which we rely, the court of appeals held (Pet. App. A 13-15):

> Here that voluminous record surely indicated the determinative reason for the final agency action: a finding that the new bank was soundly organized,

> capitalized and managed and constituted a sound economic venture in light of the banking needs and services already available in the surrounding community. When findings of fact, rendered contemporaneously with the concomitant administrative decision, are subsequently available, a reviewing court may not require the agency officials who participated in that decision to give testimony explaining their action unless there has been a strong showing of bad faith or improper behavior. * * *
>
> * * * * *
>
> The appellant's assertions of misconduct and collusion are wholly refuted by the record.

The court of appeals' decision is in accord with the principles set forth in this Court's opinion in *Camp* v. *Pitts*, 411 U.S. 138. There is no occasion for further review.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.